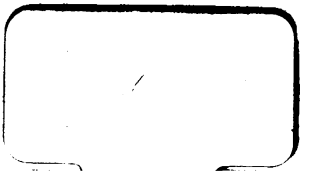

The Law

OF

BOUNDARIES & FENCES

IN RELATION TO THE

SEA-SHORE AND SEA-BED; PUBLIC AND PRIVATE RIVERS AND LAKES; PRIVATE PROPERTIES; MINES; RAILWAYS; HIGHWAYS; CANALS; WATERWORKS; PARISHES AND COUNTIES; CHURCH LANDS; INCLOSED LANDS; ROADS, ETC.

TOGETHER WITH

The Evidence in proof of Boundaries and the Remedies where Boundaries, etc., are affected or confused,

AND INCLUDING THE LAW OF

PARTY WALLS AND PARTY STRUCTURES,

BOTH GENERALLY AND WITHIN THE METROPOLIS.

BY

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Fifth Edition

BY

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PREFACE.

IN editing Hunt's "Boundaries and Fences," the Fifth Edition of which has been entrusted to me, I have stated the Law as I find it in statutes and judicial decisions, purposely avoiding, as far as may be, giving my opinion as to what should or should not be the Law: for the opinion of a text-book writer, as he can but generalize, is but a Will-of-the-wisp to the unwary, as it may be wrong, or a mere conjecture entirely unsupported by authority; and, even if right, is not unlikely to be upset by some judicial eccentricity.

In the arrangement of the work the chapters have been divided into sections, which respectively contain everything that properly

should be therein: moreover, for the convenience of the reader catch lines and words are employed in the text and notes to bring into strong relief any salient proposition.

Special stress has been laid on the powers of County and District Councils with respect to Boundaries, and the Work is revised as to Statute and Case Law to the end of the judicial year, 1903.

HENRY STEPHEN.

1, ELM COURT, TEMPLE,
January, 1904.

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ERRATA.

P. 163, note (*g*), *for* 57 & 58 Vict. *read* 52 & 53 Vict.

P. 244, note (*k*), *delete* 2 Br. N. C. 102 ; 7 Bing. 332.

THE LAW

OF

BOUNDARIES AND FENCES.

CHAPTER I.

A. Definition of boundary.—A boundary is any separation, natural (*a*) or artificial (*b*), which marks the confines or line of division of two contiguous estates (*c*).

(*a*) **A natural** boundary is a natural object remaining where it was placed by nature (Bouvier, Law Dict.).

(*b*) **An artificial** boundary is one created by man for the purpose of designating limits (4 Am. and Eng. Encyc. of Law, 2nd ed., p. 759, quoting Boone on Real Property, sect. 302).

(*c*) Bouvier, Law Dict. See also 3 Touillier, Le Droit Civil Français, n. 171.

Other definitions are: "That which serves to indicate the bounds or limits of anything" (Century Dict.).

"A line or connected series of lines, going around a territory or tract of land and enclosing it on all sides" (4 Am. and Eng. Encyc. of Law, 2nd ed., p. 758).

Distinction between boundary and fence.—"Mearing or *boundary* signifies the ascertained limits of adjacent lands belonging to different proprietors; and fence is properly applicable to the inclosure of lands by walls, drains, or hedges, for the purpose of

B. Nature of boundary.—The nature of a boundary is immaterial, and it may be a straight (*d*) or deflected (*e*) line running between two specified objects (*f*), such as the line of a ledge of rocks (*g*) or other object running across or between adjoining properties (*h*), but it must be of a continuous character (*i*).

C. Description of boundaries.—A boundary may be described either by a reference to natural features or by defining it by mathematical lines. In either case, however, boundaries should be described with the utmost accuracy, the duty of accuracy being generally equally divided between the grantor and the grantee, or lessor and lessee, as the case may be; and, if the description be couched in such ambiguous terms that it is very difficult to determine what were intended to be the boundaries, but the language of the description equally admits of two different constructions, one of which would make the quantity of the land conveyed agree with the quantity mentioned in the deed, and the other would make it altogether different, the former construction must prevail (*k*).

It, however, is well settled that the vendor of land must avoid misleading the purchaser with respect to the

agricultural improvement, or of preventing trespass" (1 Furlong, Landlord and Tenant, p. 696).

(*d*) *Herrick* v. *Sixby*, L. R. 1 P. C. 436; *Johnson* v. *Pannel*, 2 Wheat. (U.S.) 206.

(*e*) *Hays* v. *Askew*, 8 Jones (Law), N. Car. 226.

(*f*) *Herrick* v. *Sixby*, L. R. 1 P. C. 436.

(*g*) *Ibid.*

(*h*) **Illustrations of objects locating a boundary line** are a **fault** intersecting a mine if the property consist of mines (*Davis* v. *Shepherd*, L. R. 1 Ch. 410); **houses** (*Sherman* v. *Williams*, 113 Mass. 481; 18 Am. Rep. 522); **fences** (Woolrych on Fences, p. 281); **party-walls** (*Matts* v. *Hawkins*, 5 Taunt. 20; *Cubitt* v. *Porter*, 8 B. & C. 257); **waters** (*Scratton* v. *Brown*, 4 B. & C. 485; *Bickett* v. *Morris*, L. R. 1 H. L. 47; 12 Jur. (N.S.) 803; 27 W. R. 742; *Holford* v. *Bailey*, 13 Q. B. 426; *Indiana* v. *Milk*, 11 Fed. Rep. (U.S.) 389), the **sea-shore** (*Attorney-General* v. *Chambers*, 4 De G. M. & G. 206).

(*i*) *Rockwell* v. *Adams*, 6 Wend. (N.Y.) 467.

(*k*) *Herrick* v. *Sixby*, L. R. 1 P. C. 436, 451.

boundaries of the property sold ; and, to prevent any mistake on the part of the purchaser regarding the extent thereof, the vendor should, in all cases where there is any possibility of mistake, not only mark the boundaries on the plan (if any) but also in express words describe the boundaries in the particulars of sale, in the event of the boundary not describing itself should an intending purchaser go to look at the property: in case no such description be given, the purchaser cannot be compelled to complete the purchase if deceived by the plan and particulars respecting the extent of the property which he intended to purchase (*l*). On the other hand, the purchaser must take reasonable care to ascertain what he is buying, or the fact that he buys under a reasonable belief that he is buying something not included in the property, will not relieve him from specific performance of his contract (*m*), unless an advantage not contemplated by the vendor will result to him therefrom, or there be fraud, *mala fides*, or any dishonest intention on his part (*n*).

D. As to inclusion of boundary in land it bounds.—A local feature described as a boundary is not thereby

(*l*) *Denny* v. *Hancock*, L. R. 6 Ch. 1, in which case it appeared that a sale plan represented property to be sold as bounded on its western side by a strip of ground covered with shrubs and trees, and that an intending purchaser went with the plan in his hand to inspect the property, and on inspection thereof found on the western side a belt of shrubs and three magnificent trees inclosed on the west by an iron fence, and accordingly bid for the property under the belief that he was buying everything up to the iron fence : but, it afterwards appearing that the iron fence was not the boundary, which was denoted by stumps so shrouded by the shrubs as not easily to be seen, it was held that the purchaser had been misled by the vendors, and was justified in concluding that the iron fence was the boundary.

(*m*) *Tamplin* v. *James*, L. R. 15 Ch. D. 215 ; 43 L. T. (N.S.) 520, wherein it appeared that property was put up for sale by a description which could not mislead anybody who took reasonable care, for it was defined by reference to numbers on a tithe map, but that the purchaser bought in reliance upon *his* knowledge of the property without looking at the plans, and without paying any attention to the details of the particulars of sale.

(*n*) *Manser* v. *Back*, 6 Hare, 443.

necessarily excluded from being part of the property described as bounded by it, for such feature may itself be parcel of the property it bounds, or one equal half of it may be, or no part of it may be in any sense parcel thereof but wholly excluded therefrom and included in adjoining property (*o*): whether, therefore, the boundary is or is not included in property which it is described as bounding, depends upon the particular circumstances of each case. As a general rule, however, since words used in an instrument of grant as elsewhere are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found, a house, described as bounding property granted or conveyed, is not included in the grant or conveyance as parcel of what is granted or conveyed; on the other hand a grant or conveyance of property bounded by a highway, private way, or river is generally presumed to pass the right to the soil *usque ad medium filum* of such highway, private way, or river (*p*), provided the grantor at the time of the grant owned to the centre and there be no words or circumstances showing a contrary intent (*q*):

(*o*) *In re Belfast Dock Act*, 1 Ir. Rep. Eq., 128, 140, wherein it was said that although, in the ordinary case of a mound and ditch forming a fence between two adjoining properties, the whole was in the majority of cases situated entirely on one of the properties, there was no inaccuracy in describing it as a boundary of either though wholly excluded from the one and included in the other.

(*p*) *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. C. 473, 497, where it was said that, in the case of land granted being described as bounded by a highway, it was absurd to suppose that the grantor had reserved to himself the right to the soil *usque ad medium filum viæ*, in the majority of cases wholly unprofitable. See also *In re Belfast Dock Act*, 1 Ir. Rep. Eq., 128, 140; *Warner* v. *Southworth*, 6 Conn. 471.

(*q*) *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133, 145.

Reason of rule.—When it is said that the presumption is that the soil of a highway or the like *ad medium filum* is intended to pass, that is because, as between owners of lands abutting on a highway, etc. between them, the presumption is, in the absence of knowledge of the precise facts, that each owner does own the soil of the highway *ad medium filum*. If it turned out that the highway was unequally divided between the owners of the properties on its opposite sides, the presumption that the soil of the highway passed

the rule of construction being that a boundary object is excluded from the subject-matter of a grant when the nature of the object is such that an independent title thereto would commonly be made, but in all other cases the object is included as a whole, or, should it be a highway or stream, *usque ad medium filum*, or to the extent of the grantors interest in such highway, stream, etc. (*r*).

Moreover, if the boundary be a highway, it is not material that the highway happens to be a street in a town, for there is no reason that the general presumption should not apply (*s*).

It must, however, be remembered that the right of the owner of land bounded by a highway, etc., to the soil thereof *usque ad medium filum viæ* is merely a presumption of law, and that recourse cannot be had thereto when all the facts are known (*t*). Moreover, the presumption holds good only until rebutted by evidence to the contrary, and where the highway is a street in a town, the presumption is very easily rebutted (*u*): again,

by a conveyance by the owner of the property on one side thereof would not be negatived, but the presumption would be that the grantor intended to pass the soil of the highway so far as it was vested in him (*In re White's Charities, Charity Commissioners* v. *London Corporation*, [1898] 1 Ch. 659; 67 L. J. Ch. 430; 78 L. T. 550; 46 W. R. 479).

(*r*) **The side of land, or of a house, mill, wharf** or the like referred to as bounding land granted is the limit of the grant (*City of Boston* v. *Richardson*, 13 Allen (Mass.), 144, 154).

When the boundary is an object which in ordinary speech does not suggest a title in fee but simply defines a boundary, *e.g.*, a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the centre of the object specified as the boundary is the boundary limiting the grant (*Warner* v. *Southworth*, 6 Conn. 471).

(*s*) *In re White's Charities, Charity Commissioners* v. *London Corporation*, [1898] 1 Ch. 659; 67 L. J. Ch. 430; 78 L. T. 550; 46 W. R. 479. See also *Haynes* v. *King*, 63 L. J. Ch. 21.

(*t*) *Mappin* v. *Liberty*, [1903] 1 Ch. 118; 72 L. J. Ch. 63; 87 L. T. 523; 19 T. L. R. 51.

(*u*) *Beckett* v. *Leeds*, L. R. 7 Ch. 421, in which case there was a question as to whether certain houses adjoining to an old street in which markets had at one time been held were bounded by the middle line of the street, or by the verge thereof next to the houses; and, since the circumstances of the case manifestly showed that the lords of the manor, upon their grants of the tenements

it is doubtful whether the presumption applies to a lease (*x*).

Accordingly where, in the case of grants of building sites, it is the intention that the grantee shall own the adjoining street or intended street *ad medium filum*, the land up to the middle of the road is expressly included in the grant and the road part, colored, in or upon a plan annexed to the grant, differently from the residue of the land granted, making it appear as a narrow strip or fringe to the land.

It, however, often happens in modern grants—say, of parcels of building land—that, even where the boundary is expressed to be a highway, or intended highway, no part thereof is included in the grant (*y*); and in all such cases, therefore, the verge of the highway nearest to the land comprised in the grant would be the boundary line.

adjoining to the old street had retained in themselves the soil of the street and had exercised acts of ownership over that street and the soil thereof and derived in fact a pecuniary income from granting the use of it to third parties, it was held that the boundary was the verge of the street next to the tenements.

Sufficiency of facts to rebut presumption.—Anything to show that it was not the intention to convey any part of a road is always enough to rebut the presumption: Thus the fact that a grantor of land, bounded by a street, is a municipal authority entitled to part of the soil of that half of the street furthest from the land granted, does not rebut the presumption that the grant passed to the grantee the half of the soil of the street nearest to the subject-matter of the grant (*In re White's Charities, Charity Commissioners* v. *London Corporation*, [1898] 1 Ch. 659; 67 L. J. Ch. 430; 78 L. T. 550; 46 W. R. 479); so the presumption is rebutted where the land is granted by a public body, whose duty it is to retain the ownership of the soil of the street abutting on such land for the purpose of discharging certain responsibilities connected with the street (*Mappin* v. *Liberty*, [1903] 1 Ch. 118; 72 L. J. Ch. 63; 87 L. T. 523, citing *Plumstead* v. *Brit. Land Co.*, L. R. 10 Q. B. 16, 24).

(*x*) *Mappin* v. *Liberty*, [1903] 1 Ch. 118; 72 L. J. Ch. 63; 87 L. T. 523. But see *Dwyer* v. *Rich*, Ir. Rep. 6 C. L. 144; *Tilbury* v. *Silva*, 45 Ch. D. 98.

(*y*) *Leigh* v. *Jack*, 6 Exch. D. 264.

CHAPTER II.

A. Property in sea-shore.—AT CIVIL LAW, the sea-shore is public property and common to all mankind (*a*).

AT COMMON LAW, the soil of the sea, and of estuaries and navigable tidal rivers, was originally the property of the Crown, and it still remains in the Crown (*b*), except in those cases where that property has been transferred to a subject (*c*).

(*a*) Instit. lib. ii. tit. 1, p. 1—5, where it is stated that, by the law of nature, these things are common to all mankind, namely, the air, running water, the sea, *and consequently the shores of the sea;* no one, therefore, is forbidden to approach the sea-shore, provided he respects habitations, monuments, and buildings, which latter are not, like the sea, subject only to the law of nature ; and that the *use* of the sea-shore is public, and as much subject exclusively to the law of nature as the sea itself ; and therefore any person is at liberty to place on the sea-shore a cottage to which he may retreat, or to dry his nets there and to haul them from the sea, *for the shores are the property of no man*, but are subject to the same law as the sea itself, and the sand or ground beneath it.

(*b*) Hale, De Jure Maris, pp. 12, 25 ; *Constable's Case*, 5 Coke Rep. 107.

(*c*) *Malcolmson* v. *O'Dea*, 10 H. of L. Cas. 593.

BY THE LAW OF SCOTLAND, the sea-shore is not deemed to be the property of the Crown, but is presumed to have been granted as part and parcel of the adjacent land, subject only to the rights of *use* in the public (*d*).

IN THE UNITED STATES OF AMERICA, the sea-shore and that of estuaries and tidal rivers belongs either to individual states abutting thereon, or to the United States in trust for the people (*e*).

NATURE OF PUBLIC RIGHTS.—The public rights referred to consist, in general, only of the rights of navigation and of fishing (*f*); and do not include, *e.g.*, alleged bathing rights (*g*), alleged boating rights (*h*), alleged rights of using the foreshore as a place of storage for oysters, etc., to the exclusion of other members of the public (*i*), alleged rights of drying nets (*k*), alleged rights of beaching boats in the winter (*l*), of holding meetings or of delivering lectures or sermons (*m*), and the like, which must (if they exist at all) have arisen by express grant, or by long use, or by custom (*n*) where the right claimed is reason-

(*d*) *Lord Advocate* v. *Blantyre*, 4 App. Cas. 770.

(*e*) 4 Am. and Eng. Encyc. of Law, 2nd ed., p. 819, quoting *Martin* v. *Waddell*, 16 Pet. (U.S.) 367; *Pollard* v. *Hagan*, 3 How. (U.S.) 218; *Stewart* v. *Fitch*, 31 N. J. L. 18, and other authorities.

(*f*) *Free Fishers of Whitstable* v. *Gann*, 11 H. of L. Cas. 192; *Free Fishers of Whitstable* v. *Foreman*, L. R. 2 C. P. 688; L. R. 3 C. P. 578; *Llandudno Urban Council* v. *Woods*, [1899] 2 Ch. 705; 68 L. J. Ch. 623; 81 L. T. 170; 48 W. R. 43; 63 J. P. 775.

(*g*) *Blundell* v. *Catterall*, 5 B. & Ald. 292; *Mace* v. *Philcox*, 15 C. B. (N.S.) 600.

(*h*) *Bourke* v. *Davis*, 44 Ch. D. 110.

(*i*) *Mayor, etc.* v. *Rowe*, [1902] 2 K. B. 709; 18 T. L. R. 820.

(*k*) *Gray* v. *Bond*, 2 B. & B. 667.

(*l*) *Alton* v. *Stephen*, 1 App. Cas. 456.

(*m*) *Llandudno Urban Council* v. *Woods*, [1899] 2 Ch. 705; 68 L. J. Ch. 623; 81 L. T. 170; 48 W. R. 43; 63 J. P. 775.

(*n*) *Laird* v. *Briggs*, 19 Ch. D. 22; *Aiton* v. *Stephen*, 1 App. Cas. 456; *Bourke* v. *Davis*, 44 Ch. D. 110.

ably limited and is not to a profit *in alieno solo* (*o*), but custom alone will not as a general rule render the shore subject to a taking by the public of shingle, gravel, sand and the like therefrom; and the exercise of any such pretended rights may be enjoined, where based upon custom only (*p*).

EXTENT OF FORESHORE.—The foreshore extends as far as the greatest winter flood runs up, according to the civil law (*q*), but by the common law, the shore is that portion only of the land adjacent to the sea that lies between ordinary high-water and ordinary low-water mark, being the portion which is alternately covered and left dry by the ordinary flux and reflux of the tides (*r*); or, in other words, the line of demarcation between the sea-shore and the land of the adjoining proprietor above is the line of the medium high tide between the springs and the neaps (*s*).

(*o*) *Constable* v. *Nicholson*, 14 C. B. (N.S.) 230; 32 L. J. C. P. 240; *Blewitt* v. *Tregonning*, 3 A. & E. 554; *Padwick* v. *Knight*, 7 Exch. 854.

Right of dredging for oysters.—In *Saltash* (*Mayor*) v. *Goodman*, 5 C. P. D. 431; 7 Q. B. D. 106; 7 App. Cas. 633, it was held that the right of dredging for oysters might lawfully arise by custom, and where reasonably limited is not a right to a profit *à prendre in alieno solo*.

(*p*) *Clowes* v. *Beck*, 13 Beav. 347; *Chalk* v. *Wyatt*, 3 Mer. 688; *Earl Cowper* v. *Baker*, 17 Ves. 128.

Custom of taking sand or shingle by copyholders.—Where the sea-shore is parcel of the waste lands of a manor, the copyhold tenants may possibly be able to make claim by custom to take sand or shingle from the sea-shore (*Bailey* v. *Stephens*, 12 C. B. (N.S.) 91; *Warwick* v. *Queen's College, Oxford*, L. R. 10 Eq. 105; L. R. 6 Ch. 716).

(*q*) Instit. lib. ii. tit. 1, pp. 1—5; *Blundell* v. *Catterall*, 5 B. & Ald. 292; 7 E. C. L. 102.

(*r*) Hale, De Jure Maris, pp. 12—25.

(*s*) *Attorney-General* v. *Chambers*, 4 De G. M. & G. 216, wherein it was stated by CRANWORTH, L.C., that "The principle which gives the shore to the Crown, is, that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil; but as regards land which is only covered

It follows that land adjoining the sea-shore, but lying above the line of the medium high tide between the springs and the neaps, and which is only overflowed at high spring tides, *primâ facie* belongs to the owners of the adjoining land; and the Crown, if entitled thereto at all in any particular case, is not entitled thereto *jure coronæ*, or *jure regali*, but by title of long user (*t*),—or by other substantive and individual title.

The sea-shore, however, is not a fixed freehold, but is a freehold which shifts as the sea recedes or advances (*u*).

B. Alienation of sea-shore.—IN GENERAL.—It is now well settled that a private individual may acquire a right to the soil of the sea-shore by express grant, or by long-continued user (*v*), but not as a general rule by custom (*x*). And accordingly the shore is sometimes found to belong to a private individual in gross; but more commonly it belongs to him as part and parcel of some manor,—the private right being subject, in either case, to the general rights of using the foreshore for certain recognized purposes, possessed by the public, to which it was subject while in the hands

by the high spring tides, Lord HALE was of opinion that such land did not belong to the Crown, because it was, for the most part, dry and maniorable; and the reasonable conclusion is, that the Crown's right is limited to land which is, for the most part, not dry or maniorable. Now the limit indicating such land is *the line of the medium high tide between the springs and the neaps*, all land below that line being more often than not covered at high water, that is to say, covered by the ordinary flux of the sea; but that cannot be said of land above that line; and I therefore think that that medium line must be treated as bounding the right of the Crown." See also *Lowe* v. *Govett*, 3 B. & Ad. 863.

The common law in the United States of America defines the limits of the shore of the sea, of estuaries and tidal streams (4 Am. and Eng. Encyc. of Law, 2nd ed., p. 819).

(*t*) Hale, De Jure Maris, c. 4, p. 12.

(*u*) *Scratton* v. *Brown*, 4 B. & C. 485.

(*v*) Hale, 17, 18; *Attorney-General* v. *Emerson*, [1891] A. C. 649.

(*x*) *Constable* v. *Nicholson*, 14 C. B. (N.S.) 230; 32 L. J. C. P. 240; *Blewitt* v. *Tregonning*, 3 A. & E. 554; *Padwick* v. *Knight*, 7 Exch. 854.

of the Crown, and to which it therefore remains subject in the hands of the Crown's grantee (*y*).

Where the private title to the sea-shore arises by Crown-grant, such grant must be of a date anterior to the early statutes restraining alienation by the Crown (*z*); but juries are ordinarily directed to presume an ancient lost grant from the Crown when there have been long-continued acts of ownership exercised on the sea-shore by the adjoining proprietor (*a*). And the acts of ownership commonly relied upon for this purpose are, *e.g.*, constantly and usually fetching gravel, and sea weed and sea sand, between the high-water and low-water mark, and licensing others so to do; inclosing and embanking against the sea, and the enjoyment of what is so inned; the enjoyment of wrecks happening upon the sand; the presentment and punishment of *purprestures* in the court of the manor; and such like (*b*).

When, however, the acts of ownership relied upon have not been continuous, but only occasional, and have been always the subject of dispute, the court will not readily direct the jury to presume a lost grant (*c*): Thus, the mere user of the sea-shore by the turning on of cattle, although without interruption for a period of sixty years, has been held not to be such an act of ownership as to raise a presumption of title in the owner of the cattle (*d*), because the sea-shore is property of such a nature that it cannot easily be protected against intrusion, and it is not worth the trouble and expense of fencing it. Knowledge, therefore, or acquiescence, on the part of the person

(*y*) Hale, 26, 27; *Fitzpatrick* v. *Robinson*, 1 Hud. & Br. 585.

(*z*) 1 Anne, st. 1, c. 7, s. 5; 34 Geo. 3, c. 75.

(*a*) *Mayor of Kingston* v. *Horner*, Cowp. 102, 215; *In re Belfast Dock Act*, 1 Ir. Rep. Eq. 128; *Re Alston's Estate*, 5 W. R. 189.

(*b*) Hale, De Jure Maris, 27; *Calmady* v. *Rowe*, 6 C. B. 861; *Duke of Beaufort* v. *Mayor of Swansea*, 3 Exch. 413; *Lord Advocate* v. *Young* and *North British Rail. Co.* v. *Young*, 12 App. Cas. 544.

(*c*) *Livett* v. *Wilson*, 3 Bing. 115.

(*d*) *Attorney-General* v. *Chambers*, 4 De G. & J. 55.

interested in resisting the right claimed, or perseverance by the claimant in the assertion and exercise of such right in the face of opposition, must, in general, be proved in such a case to enable the claimant to establish his title. And of course, if the claimant rests his title upon adverse possession, he must show an exclusive possession (*e*)—a matter peculiarly difficult for any third party to show, as against the adjoining proprietor—although by reclamation of the shore, that may be done (*f*).

HOW SEA-SHORE MAY PASS.—The sea-shore has been held, in many cases, to pass under a grant of the wastes of a manor: Thus, where there was a grant in fee of all the coals and coal-mines found or to be found within the commons, waste lands, or marish grounds, within a certain lordship, with full power and authority to dig, search for, and sink pits, and open the mines in all places convenient within the said commons, waste grounds and marishes, for the getting of coal within the lordship, and the sea-shore was part of the manor, it was held that the coals under the sea-shore passed to the grantee (*g*), and that the word "waste" was a sufficient description of the foreshore, that is, of the land between high and low-water marks (*h*).

The sea-shore may also pass under the word *ripa*, or bank (*i*), or even under the words anchorage and groundage (*k*). And according to Lord HALE and Lord COKE, where there has been a grant by the Crown to the lord of a manor of the right to take "wreck," there is a *primâ facie* presumption that the sea-shore itself was also intended to pass (*l*); and the opinion to the contrary, that

(*e*) *Smith* v. *Lloyd*, 9 Exch. 562.

(*f*) *Smart* v. *Suva Town Board*, [1893] A. C. 301.

(*g*) *Attorney-General* v. *Hammer*, 4 Jur. (N.S.) 751.

(*h*) *Attorney-General* v. *Jones*, 33 L. J. Ex. 249; *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770.

(*i*) *In re Belfast Dock Act*, 1 Ir. Rep. Eq. 128, 140.

(*k*) *Le Strange* v. *Rowe*, 4 F. & F. 1048; *Calmady* v. *Rowe*, 6 C. B. 891; *Foreman* v. *Free Fishers of Whitstable*, L. R. 4 E. & I. App. 266.

(*l*) Hale, De Jure Maris, p. 27; *Constable's Case*, 5 Rep. 107; Hall on the Sea-shore, 3rd ed., by Moore, pp. 102—104.

the right to wreck is merely a franchise, carrying with it no right to the soil of the shore (*m*), should probably be now discredited.

C. The sea-bed.—IN GENERAL.—The sea-bed is that land which extends seawards from the foreshore or sea-shore as above defined, the Crown being vested with the property in or the soil thereof (*n*). Moreover, this ownership or *dominium* of the Crown extends not only over the open seas, *scilicet*, the four seas, but also over all creeks and estuaries or arms of the sea, havens, ports, and tidal rivers, around the coasts of the kingdom (*o*).

ALIENATION OF.—As in the case of the sea-shore, the sea-bed may, as regards distinct parts thereof, called *districtus maris*, have been alienated by the Crown, and so have become vested in some individual proprietor (*p*), thus, oyster-beds lying below low-water mark are often found to belong to private owners, as being the Crown grantees thereof: and inasmuch as what may be acquired by express grant can also be acquired by prescription, or long possession, which implies a grant, so a definite portion of the sea-bed or *districtus maris* may also be acquired by long possession even as against the Crown, that is to say, by the fiction of a lost grant (*q*).

(*m*) Phear on Rights of Water, p. 41.

(*n*) *Free Fishers of Whitstable* v. *Gann*, 11 C. B. (N.S.) 387; 13 C. B. (N.S.) 853; 11 H. L. Cas. 192, in which case it was stated by ERLE, C.J., that the soil of the sea to the extent of three miles from the beach is vested in the Crown. See also *Lord Advocate* v. *Wemyss*, [1900] A. C. 48, 66.

(*o*) Hale, De Jure Maris, p. 3.

(*p*) Phear on Rights of Water, p. 52; Callis on Sewers, p. 53.

The Crown's right to coals under the sea-bed below low water mark is not passed by a Crown grant to get coals "*infra fluxum maris*" (*Lord Advocate* v. *Wemyss*, [1900] A. C. 48).

(*q*) **Proposition recognised as sound law.**—It was stated by ERLE, C.J., in *Free Fishers of Whitstable* v. *Gann*, 11 C. B. (N.S.) 387; 13 C. B. (N.S.) 853; 11 H. L. Cas. 192, that there was no rule of law which prevented the Crown from granting to the subject that which is vested in itself; and that there were many passages in Hale which showed that a district or arm of the sea,

D. Public and private rivers and lakes.—AT CIVIL LAW, a public river was a navigable and ever-flowing river, which, as regarded the use of the bed and banks, was vested in the public, but with respect to the soil, was vested in the owners of the adjoining lands, that is to say, in the riparian owners: so that the individual proprietorship was subject to the rights of the public in the river, namely, rights of towing and of mooring boats along and to, and of loading and unloading goods upon, the banks (*r*).

BY THE LAW OF ENGLAND, the rights of user in the public are more limited, the only recognized public rights being those of navigation and of fishing (*s*). As regards the individual proprietorship of the river, the bed of a public navigable river does not, in general, belong to the proprietors of the banks, but the *alveus* or bed of public navigable rivers, so far as the tide ebbs and flows, is, as a general rule, vested in the Crown, subject, of course, to the recognized public rights of navigation and of fishing (*t*). The line of demarcation, between on the one hand the property of the Crown in the soil of the bed of a public navigable river and on the other hand the property

or the soil of a navigable tidal river, might be vested in a subject; and it was most clearly for the interest of the subject that a grant should be made, *e.g.*, for the sustenance of a profitable fishery.

A case, regarded by some as holding the contrary, viz., *Attorney-General* v. *Farmer* or *Farmen*, 2 Lev. 172; T. Raym. 241, will be found, on a critical examination thereof, not to have been a decision at all on the point (Moore on the Foreshore, 3rd ed., pp. 417, 418).

(*r*) Instit. lib. ii. tit. 1, 4.

(*s*) *Ball* v. *Herbert*, 3 T. R. 253; *Badger* v. *South Yorkshire Rail. Co.*, 1 E. & E. 347; *Monmouth Canal Co.* v. *Hill*, 4 H. & N. 427; *Hollis* v. *Goldfinch*, 1 B. & C. 205.

(*t*) *Carter* v. *Murcott*, 4 Burr. 2164; *Rex* v. *Smith*, 2 Doug. 441; *Williams* v. *Wilcox*, 8 A. & E. 333; *Lyon* v. *Fishmongers' Co.*, L. R. 10 Ch. 679; 1 App. Cas. 662.

By the law of Scotland the Crown is, as by English law, vested with the property in the bed of public navigable rivers, subject, of course, to the public rights (*Lord Advocate* v. *Hamilton*, 1 Macq. 46).

of the riparian owners on each side of the stream, requires accordingly to be defined or determined. It, however, has been held, that the Crown's property extends to the line of the medium high tides throughout the year, and above that line, whether measured on the banks or up the stream, the Crown has no right to the soil, although the river may continue navigable, but the property of the riparian owner begins, and extends where the tide reacheth not, to the *medium filum* of the stream (*u*),—the public right of *navigation* continuing throughout the river where it continues navigable, but the public right of *fishing* not extending above the flow and reflow of the tide (*x*).

WHERE THE LANDS OF TWO RIPARIAN OWNERS ARE SEPARATED by a private, that is to say, tideless river, the line of demarcation between the two estates is presumed *primâ facie* to coincide with the *medium filum* of the stream (*y*); or, in other words, the soil of the *alveus* (or bed) is not the common property of the two proprietors, but the share of each belongs to him in severalty; so that if, from any cause, the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land (*z*).

The presumption, may, however, be rebutted by evidence (*a*), and where a plaintiff asserted an exclusive right to the whole of the bed of a private river flowing

(*u*) *Middleton* v. *Pritchard*, 3 Scam. (Ill.) 510; Hargrave, Law Tracts, pp. 9, 10.

(*x*) *Murphy* v. *Ryan*, 2 Ir. Rep. C. L. 143.

(*y*) *Wright* v. *Howard*, 1 Sim. & St. 203; *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263; *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133.

(*z*) *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 47.

(*a*) *Jones* v. *Williams*, 2 M. & W. 326. See also *Bristow* v. *Cormican*, 3 App. Cas. 641; *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263; *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133.

between his land and the defendant's, acts of ownership exercised by the former on the bed and banks of the river on the defendant's side of the stream, but lower down than the defendant's land, and where it flowed between the plaintiff's land and a stranger's land, were admitted as evidence of the plaintiff's exclusive right to the whole bed.

In accordance with the foregoing distinctions, a grant of land expressed to be bounded by a *private* river will be construed, in general, to carry the title of the grantee to the centre of the stream, unless the contrary be clearly expressed (*b*) ; and, on the other hand, where the Crown has granted land bordering on a *public* river below tide water, the grantee will only take down to the high-water mark.

Grants by the Crown are also invariably construed most strongly against the grantee ; and no alienation as against the Crown will be presumed, beyond what is expressed (*c*), that is to say, nothing will pass in such a grant, unless the intention is *manifest* that it shall pass (*d*).

AMERICAN RIVERS AND LAKES.—The rule of the common law of England which presumes the boundary line of two estates separated by a private (that is to say, tideless) navigable river to coincide with the *medium filum* of the stream, does not apply to the great rivers of America, or to the great fresh water lakes of that country : but the rule applicable to such great rivers and fresh water lakes, is that applicable to the sea and to rivers in which the tide ebbs and flows ; consequently a state grant of lands bounded by one of these great rivers or lakes will convey no interest to the grantee in the bed of the stream or lake, and the boundary of the owners of land abutting

(*b*) 3 Kent, Comm., 10th ed., 560, 564 ; Angell on Watercourses, 23 *et seq.*

(*c*) *The Elsebe*, 5 Rob. A. R. 183 ; *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. C. 473.

(*d*) *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875. See also *Feather* v. *The Queen*, 6 B. & S. 283 ; 35 L. J. Q. B. 204.

on such rivers or lakes, extends no further than the line at which the water usually stands when unaffected by disturbing causes (*e*).

The rule, however, respecting lands bounded by artificial lakes and ponds is different, for the boundary of the adjoining owners extends *primâ facie* to the middle line of the lake or pond, unless the pond has been so long kept up as to have acquired another well-defined boundary (*f*).

IN ENGLAND AND SCOTLAND the soil of public navigable lakes does not belong to the Crown, but to the owners of the adjoining lands, subject to the public rights of navigation (*g*) ; there being no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is water forming a lake (*h*), though it has been suggested that the Crown, of common right, is entitled to the soil of the lakes (*i*).

E. Whether the sea-shore is parochial.—The sea-shore may be parcel of a vill or parish, but *primâ facie* and in general it is extra-parochial (*k*) ; and so also are arms of the sea, estuaries, and navigable rivers : therefore, where a navigable river divides two parishes, the boundary of each parish is presumed, until the contrary be shown, to coincide with the line of the medium high tide on each bank ; and the bed of the river is consequently extra-parochial (*l*). This, however, is merely a

(*e*) 4 Amer. and Eng. Encyc. of Law, 2nd ed., pp. 832 *et seq.*, citing *Indiana* v. *Milk*, 11 Fed. Rep. 389 ; *Champlain, etc. Rail. Co.* v. *Valentine*, 19 Barb. (N.Y.) 491 ; *Canal Commissioners* v. *People*, 5 Wend. (N.Y.) 423 ; *Sloan* v. *Biemiller*, 34 Ohio St. 492.

(*f*) 4 Amer. & Eng. Encyc. of Law, 2nd ed., p. 836.

(*g*) Bell's Principles of Laws of Scotland, § 651 ; *Mackenzie* v. *Bankes*, 3 App. Cas. 1324.

(*h*) *Bristow* v. *Cormican*, 3 App. Ch. 641.

(*i*) *Marshall* v. *Ulleswater Navigation Co.*, 3 B. & S. 732 ; 32 L. J. Q. B. 139 ; L. R. 7 Q. B. 166.

(*k*) *R.* v. *Musson*, 8 E. & B. 900 ; *R.* v. *Gee*, 1 E. & E. 1068.

(*l*) *Trustees of the Duke of Bridgwater* v. *Bootle*, 7 B. & S. 348 ; L. R. 2 Q. B. 4 ; *M'Cannon* v. *Sinclair*, 2 E. & E. 53 ; *Proprietors*

primâ facie presumption, and evidence may be produced to show that as a matter of fact the bed of the river belongs to both or exclusively to one of the adjoining parishes: Thus, a pier which rested on wooden piles fixed in the bed of a river between high and low water mark, was adjudged to be intra-parochial, and liable accordingly to be rated to the relief of the poor (*m*); so, a wet dock constructed on a portion of land reclaimed from the ooze or bed of a navigable tidal river was adjudged to be intra-parochial, for, although the perambulations of the parish and of other parishes abutting on other portions of the reclaimed land seemed to show that the rights of those parishes extended only to high water mark, yet as it appeared that in each of the parishes considerable tracts which had been reclaimed from the ooze or bed of the river were rated to the poor rate, the presumption of the parochiality arising from payment of these rates was considered to outweigh the contrary presumption arising from the perambulations (*n*).

F. Offences on sea-shore and navigable rivers.—The shores of the sea and the beds of navigable rivers *usque ad medium filum* are part and parcel of the adjoining counties, to the intent that the justices may take cognizance of offences committed thereon, whether the land was covered or not with water at the time the offences were

of Waterloo Bridge v. *Cull*, 5 Jur. (N.S.) 1288; *R.* v. *Landulph*, 1 Moo. & R. 393.

(*m*) *M'Cannon* v. *Sinclair*, 5 Jur. (N.S.) 1022; 28 L. J. M. C. 247, in which case it was said by Lord CAMPBELL: "At *nisi prius* I should direct a jury to presume from the circumstances of this case that the land on which the pier is built was within the parish of Rotherhithe. When the beaters of the boundaries go as near the extremities of the parish as the nature of the land will admit of, what more is necessary? They assume that it is well known that the parish extends to the middle of the river; . . . other neighbouring parishes on the Thames extend to the middle of the river."

(*n*) *Ipswich Dock Commissioners* v. *Overseers of St. Peter, Ipswich*, 7 B. & S. 310. See also *Perrott* v. *Bryant*, 2 Y. & C. 61.

committed (*o*). Moreover, it has been stated (*p*), with reference to the criminal jurisdiction of the courts of this country that whatever of the sea lies within the body of a county (meaning the "Queen's chambers") is within the jurisdiction of the common law; and that whatever of the sea lieth not within the body of any county belonged formerly to the jurisdiction of the admiral, and now belongs to the courts to which the jurisdiction of the admiral has been transferred by statute; and that in the estuaries or mouths of great rivers below the bridges, in the matter of murder and mayhem, the jurisdiction is the concurrent jurisdiction of the common law courts and of the Admiralty Court; that on the shore of the outer sea the body of the county extends so far as the land is uncovered with water; and that as regards the shore between high water mark and low water mark, the jurisdiction belonged to the admiral when that was covered with water, and to the common law courts when that was uncovered with water. And it has also been stated, with regard to the three mile zone or belt round the shores of England (commonly called the territorial waters), that, by international law incorporated by usage into the English law, the only jurisdiction, which prior to the Territorial Waters Jurisdiction Act, 1878 (*q*) could be exercised by the English courts over foreigners not commorant in England, related to the navigation, the revenue, the fisheries, and the question of neutrality; and that there was neither usage or statute extending the English law generally to such foreigners in respect of offences committed by them within the said zone or belt. However, by the Territorial Waters Jurisdiction Act, 1878 (*r*), this

(*o*) *Embleton* v. *Brown*, 6 Jur. (N.S.) 1298; 1 Russell on Crimes, 153 (4th ed.).

(*p*) *The Queen* v. *Keyn*, 2 Exch. Div. 63—239, in which case the defendant, a foreigner, was held not within the jurisdiction of the Central Criminal Court, so as to enable that court to try him for the offence of manslaughter committed within the three mile zone.

(*q*) 41 & 42 Vict. c. 73.

(*r*) *Ibid.*

jurisdiction has now been conferred on the English courts, as representing the old jurisdiction of the admiral, the statute being (*pro majori cautelâ*) declaratory also and not merely enactive.

G. Free and several fisheries.—According to the latest authorities, the right to a several fishery *primâ facie* imports the ownership of the soil of the sea or river wherein the right of fishery is exercised (*s*), and this is so, whether the river be navigable, or neither public or navigable (*t*). This opinion, however, has been much dissented from; various reasons having, by eminent authorities, been suggested in favour of the adoption of a different opinion (*u*).

But the reasonings appear to depend for their cogency upon the assumption, that the fishery is incident to the ownership of the soil,—which assumption is by no means beyond question; for it has been held that, where the Crown has at a date prior to Magna Charta granted lands together with a several fishery and the lands and fishery afterwards revert to the Crown, upon a forfeiture or otherwise and are re-granted to a subject, the fishery revives, *not having been merged by the union in the Crown*,

(*s*) *Somerset* v. *Fogwell*, 5 B. & C. 875; *Holford* v. *Bailey*, 8 Q. B. 1000; 13 Q. B. 427; *Attorney-General* v. *Emerson*, [1891] A. C. 649; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.

(*t*) *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401, 411. See also *Foster* v. *Wright*, L. R. 4 C. P. D. 438; *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554, 570.

(*u*) *Marshall* v. *Ulleswater Steam Navigation Co.*, 3 B. & S. 732, 748; 6 B. & S. 570, in which case COCKBURN, L.C.J., said: "It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the water. Why then should the grant of such a fishery be considered as carrying with it the property in the soil? . . . If the intention be to convey the soil, why not convey the land at once, leaving the fishery (which is the accessory) to follow? Why grant the accessory that the principal may pass incidentally? The greater is justly said to comprehend the less; but this is to make the converse of the proposition hold good. A grant of land carries with it, as we all know, the mineral which may be below the surface; but whoever heard of a grant of the mineral carrying with it the general ownership of the soil?"

but being like a right of warren (*v*). Again, it has been observed in a modern case respecting a several fishery over portion of the foreshore, that a grant of the foreshore between high and low water mark admittedly would not of itself convey the right to a several fishery over it; and, on the other hand, a several fishery may be granted independently of the ownership of the soil; but the possession of a right of several fishery is evidence of the ownership of the soil over which it is exercised (*x*), and the ownership of a several fishery raises a presumption that the freehold is in the grantee of the several fishery (*y*), although the presumption may be rebutted.

In yet a more modern case (*z*), which was the case of a several fishery in portion of a navigable but non-tidal river, it was said to be well settled, that if the right to a several fishery in a public navigable river be proved to exist, the owner of the fishery is to be presumed to be also the owner of the soil over which his fishery extends, *unless there is evidence to the contrary*, but that the reasoning on which this presumption is based was not satisfactory.

THERE CAN BE NO PUBLIC RIGHT OF FISHING in non-tidal rivers, even where they are to some extent navigable

(*v*) *Northumberland* (*Duke of*) v. *Houghton*, L. R. 5 Ex. 127, following *Rogers* v. *Allen*, 1 Camp. 310.

(*x*) *Att.-Gen.* v. *Emerson*, [1891] A. C. 649.

(*y*) *Holford* v. *Bailey*, 8 Q. B. 1000; 13 Q. B. 427.

(*z*) *Hindson* v. *Ashby*, [1896] 2 Ch. 1, 10, 11, in which case, LINDLEY, L.J., in the course of his judgment, said that the difficulties involved in the presumption were "very forcibly pointed out by COCKBURN, C.J., in *Marshall* v. *Ulleswater Steam Navigation Co.*, 3 B. & S. 746; but the presumption is supported by Mr. Butler in his note to Coke upon Littleton (122 a); it has the great authority also of BAYLEY, J., and of the other judges who decided the *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875; and it was deliberately sanctioned by the Court of Queen's Bench, and by the Court of Exchequer Chamber, in *Holford* v. *Bailey*, 8 Q. B. 1000; 13 Q. B. 426; it was also recognised as law, and was acted upon as such, by COCKBURN, C.J., himself, and by his colleagues, in *Marshall* v. *Ulleswater Steam Navigation Co.*; and, lastly, it was treated by the House of Lords in *Att.-Gen.* v. *Emerson*, [1891] A. C. 649, as no longer open to question."

rivers (*a*) ; the distinction being clear upon the whole current of the authorities in this country, and in Ireland, that when a river is navigable and tidal, the public have a right to fish therein, as well as to navigate it ; but that when it is navigable, but not tidal, no such right to fish exists in the absence of any prescriptive right gained against the owner of the several fishery (*b*) : Thus, where an information had been laid against the appellant for unlawfully fishing in a river wherein the respondents had a private right of fishery, and it was proved that the river was navigable, and that at the place where the appellant fished the water was not salt, and that in ordinary tides it was unaffected by a tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide, it was held, that the river at the place in question could not be considered as tidal within the meaning of the rule of law, which gives the public a right to fish in navigable tidal rivers, and that therefore there was no claim of title set up sufficient to oust the justices' jurisdiction ; so, where a prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a borough corporation and its lessees, but with the alleged qualification that the free inhabitants of ancient tenements in the borough had, from time immemorial without interruption and claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo*, from the 2nd of February to Easter Eve in each year, and of catching and carrying away the same, without stint, for sale and otherwise, it was held, that the claim of the free

(*a*) *Pearce* v. *Scotcher*, 9 Q. B. D. 162. See also *Murphy* v. *Ryan*, 2 Ir. C. L. R. 143 ; *Blumfield* v. *Islington*, 8 Ir. C. L. R. 68 ; *R.* v. *Burrow*, 34 J. P. 53 ; *Smith* v. *Andrews*, [1891] 2 Ch. 678 ; *Blount* v. *Layard*, [1891] 2 Ch. 681 n.

(*b*) *Reece* v. *Miller*, 8 Q. B. D. 626. See also *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 582, citing *Hudson* v. *Macrae*, 4 B. & S. 585.

inhabitants *was not to a profit à prendre in alieno solo:* and that a lawful origin for the usage ought to be presumed if reasonably possible ; and that the presumption which ought to be drawn, as reasonable in law and probable in fact, was that the original grant to the corporation had been made subject to,—and that the right of the grantee corporation still continued subject to,—a trust or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage ; and that being so, it was no objection to the right claimed by the free inhabitants, that the privilege tended to the destruction of the fishery, and, if continued, would be destructive of it (*c*).

Again, it has been held that a several fishery in a tidal river, the waters of which had permanently receded from their old channel, could not be followed from the old to the new channel (*d*). Yet where the river is not dried up but insensibly shifts its course, the fishery follows the new course : Thus, where it appeared (*e*) that the plaintiff was lord of a certain manor, and that the grant of such manor comprised the right of fishery in all the waters thereof, and, consequently in a river running through the manor ; and that some land of the manor lying near to, but not adjoining the river, had been enfranchised, and had become the property of the defendant ; and that the river gradually and insensibly wore away the bank or strip of land lying between the defendant's land and the river, and eventually encroached upon the defendant's land, the court held, that the plaintiff's several fishery gave him,—continued to him,—the exclusive right of fishery over the whole bed of the river, notwithstanding the gradual deviation of the stream on to the defendant's land ; and that the defendant was accordingly liable, as for a trespass, for fishing in the river opposite his own land.

(*c*) *Saltash* v. *Goodman*, 5 C. P. D. 431 ; 7 Q. B. D. 106 ; 7 App. Cas. 633.

(*d*) *Carlisle* v. *Graham*, L. R. 4 Ex. 361.

(*e*) *Foster* v. *Wright*, 4 C. P. D. 438.

WHEN A PRIVATE RIVER RUNS BETWEEN TWO MANORS, AND IS THE BOUNDARY between them, each lord has *primâ facie* a moiety of the river and fishery (*f*); and so where a private river is the boundary line between two estates, the right of fishery is *primâ facie* in the adjoining proprietors, as owners of the soil or bed of the river; and it extends, in general, up to the *medium filum aquæ* (*g*). The right of fishery in the adjoining proprietor extends, of course, only along the length of his own boundary next to the river, and not in general beyond (*h*). At the same time the river bed,—and with it, the fishery,—may, as we have seen, belong to some third party, and not to either of the adjoining owners (*i*).

H. Alluvion and dereliction.—IF AN ISLAND RISES IN THE SEA, it belongs to the sovereign by the law of England, although, by the civil law it belonged to the first occupant; and if an island be formed in the tidal part of a navigable river, our law also gives it to the sovereign, although the civil law gave it to the owners of the lands on each side.

IF AN ISLAND RISES IN AN UNNAVIGABLE STREAM, or in the non-tidal part of a navigable stream, it belongs both by the civil law and by the English law to the adjoining proprietors; and if the *medium filum* of the stream bisects the island equally, each proprietor will take an equal share. On the other hand, if the *medium filum* of the stream bisects the island unequally, the larger share of it will belong to him to whose land it is nearest; and if the island should arise, not in the middle, but entirely on one side of the stream, the whole of the island will belong to the owner of the land on that side (*k*).

THE PROPRIETORS OF ISLANDS, SEPARATED BY A RIVER WHICH DOES NOT EBB AND FLOW, OWN respectively to

(*f*) Davis' Rep. 155; *Tilbury* v. *Silva*, 45 Ch. D. 98.
(*g*) *Carter* v. *Murcot*, 4 Burr. 2162.
(*h*) *Ogston* v. *Stewart*, [1896] A. C. 120.
(*i*) *Hindson* v. *Ashby*, [1896] 1 Ch. 78; 2 Ch. 1.
(*k*) 3 Kent, Comm. 428; Angell on Watercourses, 42, 49.

the centre of the stream, unless the language of the grants under which they hold the islands clearly calls for a different construction (*l*); and, if a watercourse divides itself and encircles a field and thereby forms an island, the property of the field is not altered, but continues in him to whom it belonged before (*m*).

BY ALLUVION is meant the gradual accumulation of alluvial deposit upon the banks of a river or upon the shores of the sea and it occurs when the accretion is made so gradually and imperceptibly that no one can perceive how much is added at any one moment of time (*n*).

DERELICTION, on the other hand, is where from the sudden recession of the water, the land is left dry.

TO SOME EXTENT ALLUVION OR DERELICTION MAY AFFECT THE OWNERSHIP of the sea-bed and sea-shore, or of the bed or banks of a stream; and the law is well settled, that derelict land will not go to the adjoining owner but will retain its former ownership (*o*), while land gained from a navigable or other river or from the sea by alluvion goes to the owner of the adjoining lands, though the right to the shifted sea-shore, of course, remains in the Crown, or in the grantee of the foreshore, subject to the public user (*p*); but, although the quantity of the land gained

(*l*) *The People* v. *The Canal Appraisers*, 13 Wend. (N.Y.) 355.

(*m*) Angell on Watercourses, 50.

(*n*) Instit. bk. ii. tit. 1, 20; *R.* v. *Yarborough*, 3 B. & C. 91; 5 Bing. 163; 2 Bligh (N.S.) 147; 1 Dow. & C. 178.

(*o*) Hall on the Sea, 128; *R.* v. *Yarborough*, 3 B. & C. 91; 5 Bing. 163; 2 Bligh (N.S.) 147; 1 Dow. & C. 178.

(*p*) **The law is stated by Blackstone in the following terms**: "As to lands gained from the sea, either by alluvion,—by the washing up of sand and earth, so as in time to make *terra firma;* or by dereliction,—as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex;* and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge

from the sea may eventually be very great, the Crown will not be entitled to it, if it was added insensibly and by slow degrees (*q*).

THE PRINCIPLE, HOWEVER, BY WHICH ALLUVIONS OR IMPERCEPTIBLE ACCRETIONS are given to the owner of the lands adjoining, does not apply where the original boundary line can be clearly made out by marks, maps, evidence of witnesses, or by any other means. In such case, no reason can be assigned why, as regards the sea-bed or sea-shore or the bed of a public navigable river, the Crown should be deprived of its property; or why, as regards the bed of a private river, the owner should lose his property therein; for the reason which underlies the title by *alluvio* being excluded, that title itself also is excluded, upon the maxim *cessante ratione legis, cessat et ipsa lex* (*r*).

or loss; but if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for as the king is lord of the sea, and so is owner of the soil while it is covered with the water, it is but reasonable he should have the soil when the water has left it dry" (2 Bl. Com. 262). See also *Doe* v. *East India Co.*, 10 Moo. P. C. C. 140; *Attorney-General* v. *Chambers*, 4 De G. M. & G. 55; 18 Jur. 779; 23 L. J. Ch. 662.

(*q*) *R.* v. *Lord Yarborough*, 3 B. & C. 106; 2 Bligh (N.S.) 147; 5 Bing. 163; 1 Dow. & C. 178.

(*r*) In *Attorney-General* v. *Chambers*, 4 De G. M. & G. 71, it was said by Lord CHELMSFORD that Lord HALE clearly limited the law of "gradual accretions to the cases where the boundaries of the sea-shore and adjoining land are so undistinguishable that it is impossible to discover the slow and gradual changes which are from time to time accruing; and when at the end of a long period it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But where the limits are clear and defined, and the exact space between these limits and the new high water line can be clearly shown, although from day to day, or even from week to week, the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case?" *citing* Hale, De Jure Maris, pp. 14, 28.

By the rule of the Roman civil law, the boundaries of the *agri limitati* and *assignati* whose limits were fixed, either by artificial boundary marks or by specific admeasurements, were not altered by alluvion; but the boundaries of the *agri arcifinales*, whose limits were not so fixed, but which were bounded by natural monu-

EQUALLY APPLICABLE TO THE CASE OF ACCRETIONS ARISING FROM ARTIFICIAL, or partly from natural and partly from artificial causes, are the rules above stated with respect to accretions arising from natural causes, so long as the party creating the alluvion has merely exercised the lawful rights of property, and has not abused those rights with the sole or express view of causing an addition to his own property (*s*). Accordingly, if manufacturing or mining operations upon lands bordering on the sea or upon a public or private river cause a gradual silting up of rubbish, either upon the lands where the manufactories or mines are situated or upon the neighbouring property, the materials thus accumulated would be subject to the ordinary rule relating to alluvion, just as if they had been deposited by purely natural causes (*t*) : but, where the effect of these operations is to produce, not a slow and gradual, but a great and sudden acquisition of additional land to any proprietor, the rule relating to derelictions would apply and the property so gained would retain its former ownership, thus, the grantee of land adjacent to and described in the grant as bounded by, a public river, has no right of property in a large tract of ground afterwards gained from the channel of the river by the operations of the grantors, who are trustees for improving the navigation of the river (*u*).

GRADUAL ACCRETIONS ASSUME THE QUALITY OF THE LAND to which they have attached themselves. If the lord of a manor is entitled to such land as part of his

ments, such as rivers and mountains, were liable to be altered by *alluvio* (Cumin's Manual, 85). See also *Stewart* v. *Greenock Harbour Trustees*, 4 Scotch Sess. Cas. (3rd ser.) 283.

(*s*) *Attorney-General* v. *Chambers*, 4 De G. M. & G. 68, 69 ; *Smart* v. *Dundee*, 8 Bro. P. C. 119.

(*t*) *Doe* d. *Seebkristo* v. *East India Co.*, 10 Moo. P. C. C. 140 ; *Waterloo Bridge Proprietors* v. *Cull*, 5 Jur. (N.S.) 1288 ; 1 E. & E. 215 ; 29 L. J. Q. B. 10 ; *Adams* v. *Frothingham*, 3 Mass. 352.

(*u*) *Todd* v. *Dunlop*, 2 Rob. Sc. App., 353. See also *Smart* v. *Dundee*, 8 Bro. P. C. 119.

demesne, the accretions will become his absolutely ; if he is only entitled thereto subject to a copyholder's interest, then the accretions also will be his, subject to such interest ; and, if the land is part of the waste of the manor, the lord's right to the increase will be subject to the rights of the tenants for commonage, &c., in the waste (*x*).

Assuming that the title to some *districtus maris* has been acquired by express grant or by prescription, and afterwards land is derelicted there, within the known metes and bounds of such *districtus maris*, such land will become part of and belong to the owner of the *districtus maris* (*y*). In exceptional cases also, a local custom, or what appears to be a local custom, may entitle the lord of a manor to derelict lands, notwithstanding that the general rule is that custom cannot give a title to land (*z*) : Thus, it was said to be a reasonable custom for the lords of certain manors to have derelict lands, on the ground that if the sea washed away the lands of the subject he could have no recompense, unless he was held entitled to what he so regained from the sea (*a*) ; again, by what has been called the custom of the country, the *medium filum* of the river Severn is the common boundary of the manors on either side of that river ; and therefore the Crown will not be entitled to derelicted land in that river, notwithstanding that it is an arm of the sea in which the tide regularly flows and reflows (*b*). But in all these exceptional cases, it will be found, on a critical examination of them, that the apparent title by custom, was in fact a title by long possession or adverse user (*c*), where it was not by express grant.

(*x*) Hall on the Sea, 127 ; *Tilbury* v. *Silva*, 45 Ch. D. 98, 63 L. T. 141.

(*y*) 6 Bacon's Abridg. tit. "Prerogative," 400 ; Hale, De Jure Maris, c. 4. 6.

(*z*) 1 Keb. 301.

(*a*) *Attorney-General* v. *Turner*, 2 Mod. 107.

(*b*) Hale, De Jure Maris, p. 35.

(*c*) See Moore on the Foreshore, pp. 779, 780.

IF THE WATER IN A NAVIGABLE LAKE IN AMERICA recede gradually and insensibly, the land gained belongs by the law of that country to the adjacent riparian owners ; *secus*, if the dereliction be sudden ; for in the latter case the increase belongs to the state (*d*).

ENCROACHMENTS BY WATER UPON LAND.—The principles which have been considered with respect to encroachments by the land upon the water apply also to the converse case of encroachments by the water upon the land. Therefore, if the sea rises gradually and imperceptibly, the proprietors whose lands are submerged have no remedy against the Crown, whose property will consequently extend as far as the new high-water mark (*e*) ; but, if the encroachment of the water is sudden and violent, no change of property takes place, and therefore, as well during the inundation as also afterwards, upon the recession of the water, every owner will retain and take again his land if its boundaries are distinguishable (*f*).

It follows, that if a public navigable river slowly and imperceptibly changes its course, the boundaries of the property adjoining the banks will gradually shift with the altered channel ; but that if the change be sudden, no alteration of the boundaries will take place.

If a public navigable river suddenly forsakes its natural channel and flows in another bed, the old bed will by the law of England continue to be the property of the Crown, or of other the previous owner, and this is upon the same principle as that applicable to land suddenly derelicted by the sea ; but by the civil law, the old bed will in such case belong to the owners of the land on each side (*g*), for the simple reason that by the civil law, as already stated, the ownership of the bed of such a river is already in the riparian proprietors.

(*d*) *Murray* v. *Sermon*, 1 Hawks. N. C. 56.
(*e*) *In re The Hull and Selby Rail. Co.*, 5 M. & W. 327.
(*f*) Schultes, 122 ; Instit. lib. ii. tit. 1, 24 ; Co. Litt. 47, n.
(*g*) Sandars, Instit. lib. ii. tit. 1, 23.

According to the civil law, the new bed follows the condition of the river, and the use of it becomes public, while the property in the soil remains in the former owners (*h*) ; so, by the law of England, the ownership of the new bed is not altered, but remains in the former owners, subject to the public user.

Should the river afterwards resume its own channel, the civil law assigns the new bed now become derelict to the owners of the adjacent lands, these being in fact the former owners (*i*) ; and by the law of England, also, there can be no doubt that the ownership of the new bed now become derelict remains in those to whom it belonged before any change in the river took place (*k*).

And, if a private stream which is the boundary between the lands of two proprietors gradually and imperceptibly changes its course, the proprietor whose ground is encroached upon can claim nothing from his opposite neighbour, but the boundary line between them will shift with the gradual change of the river. If, however, the course of the river is diverted by some sudden catastrophe, no change of property will take place, and the *medium filum* of the old river will continue to mark the limits of the two estates (*l*).

By the civil law, a piece of land torn by the violence of a stream from one man's land and carried over to the land of another, remains the property of its former owner,—if and so long as it can be detached from its resting-place. But if the piece of land so carried over is allowed to remain for so long a time that it unites with the neighbouring soil, and the trees which it swept away with it take root in the latter soil, it will be lost to its former owner, and will become, by title of *avulsion*, the property of him to whose

(*h*) Sandars, Instit. lib. ii. tit. 1, 22.

(*i*) Sandars, Instit. lib. ii. tit. 1, 23 ; Colquhoun's Summary, § 982.

(*k*) Hale, De Jure Maris, 5, 6, 11, 13, 16, 37.

(*l*) 2 Bl. Com. 262 ; Schultes, 121 ; *Ford* v. *Lacey*, 7 Jur. (N.S.) 684 ; 7 H. & N. 151 ; 30 L. J. Ex. 352.

land it has been carried (*m*),—a principle of acquisition, which seems also applicable to the English law, but the case does not appear to have arisen, and is not likely to arise.

I. Encroachments on sea-shore and obstructions in public rivers.—At civil law, an *interdictum utile* in the nature of an injunction in equity would lie at the suit of the party injured against any one who projected a mole into the sea ; but, if no one sustained any special damage therefrom, the injunction would not lie (*n*).

By the law of Scotland, the owner of property adjoining the sea may prevent the encroachments of the sea by artificial operations ; and for this purpose, he may even encroach upon the sea,—although some doubt has been thrown upon the accuracy of this latter statement (*o*).

By the law of England, an adjoining proprietor must not make any encroachment on the sea (*p*) ; should he so do, the encroachment may be ordered to be seized into the king's hands (*q*). When the encroachment is on a portion of the foreshore, or on any *districtus maris*, belonging to a private individual, as the Crown-grantee thereof, the encroachment is as illegal as if the foreshore or sea-bed had remained in the Crown,—the remedy only for the injury being different. On the other hand, every land-owner whose land is exposed to inroads of the sea has a right to protect himself against such inroads by embanking on his own lands against the sea (*r*), and if an embankment, which is lawfully made on a man's own land, should cause a silting up of sand and mud whereby soil is

(*m*) Instit. lib. ii. tit. 1, 21.

(*n*) Dig. 43, 8, 3.

(*o*) *Smith* v. *Stair*, 6 Bell's App. Cas. 487 ; Bell's Commentaries, 723.

(*p*) Hale, De Jure Maris, 85 ; *Smart* v. *Dundee*, 3 Bro. P. C. 119.

(*q*) Moore on the Sea-shore, pp. 263—267.

(*r*) *R.* v. *Pagham Commissioners*, 8 B. & C. 355 ; 2 M. & R. 468.

gradually gained from the sea, the owner of the embankment would be entitled to this increase upon the principles of alluvion and dereliction respectively (*s*).

But, although a man may embank on his own property against the inroads of the sea,—irrespectively of any damage to the opposite proprietors, if any; in the case of embankments by the side of a river, whether public or private, a riparian owner who embanks against the river, must take care that in so doing he does not injure the property of the adjoining or opposite proprietor (*t*).

No building or erection may, in general, be set up in the *alveus* of a river, whether it is a public navigable or a private river (*u*); and therefore any encroachment upon the *alveus* of a river may be complained of by an adjacent or opposite proprietor, without the necessity of proving that special damage has been sustained, or is likely to be sustained, by him from that cause (*x*): for, when it is said that proprietors along the banks of a private river are entitled to the bed of the stream, *usque ad medium filum*, it does not by any means follow, that their property in such bed is capable of being used in the ordinary way in which land otherwise circumstanced may be used; but the bed must be so used as not to affect the interests of the other riparian proprietors, thus, not only is it illegal to divert or diminish the stream itself, but the *course* of the stream must

(*s*) *Attorney-General* v. *Chambers*, 4 De G. M. & G. 68, 70; 18 Jur. 779; 23 L. J. Ch. 662. See *supra*, p. 25.

(*t*) *Menzies* v. *Breadalbane*, 3 Bligh (N.S.) 414; *R.* v. *Trafford*, 1 B. & Ad. 880; 8 Bing. 204.

(*u*) *Attorney-General* v. *Lonsdale*, L. R. 7 Eq. 377; 38 L. J. Ch. 335; *Brownlow* v. *Metropolitan Board of Works*, 16 C. B. (N.S.) 546; 12 W. R. 871; 33 L. J. C. P. 233; *Cracknell* v. *Thetford*, L. R. 4 C. P. 629; 38 L. J. C. P. 353.

(*x*) *Wishart* v. *Wyllie*, 1 Macq. 389; *Pixley* v. *Clark*, 8 Tiffany, N. Y. App. 520; 32 Barb. (N.Y.) 268; *Brown* v. *Gugy*, 2 Moo. P. C. C. (N.S.) 341; 10 Jur. (N.S.) 525; 10 L. T. 45; 12 W. R. 492; *Attorney-General* v. *Lonsdale*, L. R. 7 Eq. 377.

not be interfered with in any way which might possibly occasion future damage thereto (*y*).

Where, however, the owners on both sides of a public navigable river were erecting on their land, which lay above where the tide reached, a bridge over the stream, resting upon piers sunk in the *alveus*, an action against them was dismissed, because the bridge did not in fact interfere with or obstruct the navigation either as theretofore exercised, or as capable of being exercised thereafter, although the Court were agreed that the plaintiffs had no right to execute any works which would interfere with or obstruct the navigation of the stream, or the free use of the towing-path as incidental to such navigation (*z*) ; and it was stated to be well settled that, except at the instance of a person, including the Crown, whose property is injured, or at the instance of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of a water-way, at some future period available as part of a water-way ; and that riparian proprietors owning the bed of a stream in severalty *usque ad medium filum aquæ* are as much at liberty to build on the bed of the river, if thereby they occasion no obstruction, as they would be to build on an island in the stream which might at some future period be swept away.

Again, where an information and bill had been filed by the plaintiff, a riparian proprietor on a tidal navigable river, to restrain the defendant, an opposite riparian proprietor, from constructing a jetty in the *alveus* of the river, so as to injure the plaintiff's property and interfere with the navigation, it was held that a riparian owner had no greater right to use the *alveus* of a tidal than of a non-tidal

(*y*) *Bickett* v. *Morris*, L. R. 1 H. L. 47; 12 Jur. (N.S.) 803 ; 14 L. T. 825. See also *Attorney-General* v. *Terry*, L. R. 9 Ch. 423 ; 30 L. T. 215 ; 22 W. R. 395.

(*z*) *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 838.

river ; and that, although the plaintiff had proved no serious injury to his property, he was entitled to an injunction (*a*). So, a grantee of the Crown or the Crown itself is not authorized to erect buildings, between high and low water, that may impede the navigation of the river (*b*) ; though an indictment for erecting buildings between high and low water will not be sustained where the erection is found not to be a nuisance (*c*).

A navigable river being a public highway, navigable by the public at large in a reasonable manner and for a reasonable purpose, a riparian owner has the right to moor a vessel of ordinary size alongside the bank, or on a wharf belonging to him there, for the purpose of loading or unloading at reasonable times and for a reasonable time : and this is so, even though the vessel should overlap another's bank, or his wharf there ; at the same time, a person must not in such case keep his vessel moored at the wharf for an unreasonably long time, or so as to interfere with the neighbouring premises, or with the free access thereto from the river, and, if such neighbouring premises are used as a dock or as a wharf, with the free access to, entrance into, or exit from, such dock or wharf (*d*).

Moreover, it has been held that, although by the Thames Conservancy Act, 1857 (*e*), the conservators may license a riparian proprietor to make an embankment in front of his own land abutting on the river, that licence goes only to exclude any question of interfering with the public right of navigation, and does not authorise the licensee to embank in front of his own land so as injuriously to affect

(*a*) *Attorney-General* v. *Lonsdale*, L. R. 7 Eq. 377 ; 38 L. J. Ch. 335.

(*b*) *Attorney-General* v. *Burridge*, 10 Price, 350. See also *Attorney-General* v. *Parmeter*, 10 Price, 378.

(*c*) *R.* v. *Betts*, 16 Q. B. 1022 ; 4 Cox C. C. 211 ; 19 L. J. Q. B. 501.

(*d*) *Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713 ; 46 L. J. 311 ; 36 L. T. 433.

(*e*) 20 & 21 Vict. c. cxlvii.

the land of another riparian proprietor (*f*), who may have a private and peculiar and even an exclusive right of access to particular land on the bank in addition to the public right of access (*g*).

Any encroachment upon the Crown, whether upon part of the demesne lands of the Crown, or upon the public highway, public rivers, harbours, or common streets, is a purpresture (*h*) ; and the remedy for such a purpresture used to be either by information of intrusion at common law, or by information in equity at the suit of the Attorney-General ; and the remedy in such case is now simply by action in the nature of these old informations. The judgment on an information of intrusion at common law, was for the abatement of the erection complained of, whether it was a nuisance or not (*i*), but, in equity, in cases where the rights of the Crown alone were invaded, the judgment usually directed an inquiry, whether it was more beneficial for the Crown to abate the purpresture, or to suffer it to remain and to have the profits arising from it accounted for as part of the royal revenue (*k*). Such an inquiry would not, however, be proper if the purpresture was also a public nuisance (*l*), for the Crown cannot of itself authorise the continuance of a public nuisance, or be a party to the maintenance thereof, which is punishable by indictment.

(*f*) *Lyon v. Fishmongers' Co.*, L. R. 10 Ch. 679 ; 1 App. Cas. 662.

(*g*) *Lee Conservancy Board* v. *Button*, 12 Ch. D. 383 ; *River Lee Navigation* v. *Button*, L. R. 6 App. Cas. 685 ; 41 L. T. 481.

(*h*) 2 Co. Instit. 38, 272 ; Glanville by Beames, B. 9, c. 11.

(*i*) Eden on Injunctions, 223.

(*k*) Mitford, Eq. Plg. 145 ; *Attorney - General* v. *Richards*, 2 Anstr. 606.

(*l*) *Attorney-General* v. *Richards*, 2 Anstr. 606.

An indictment lies to abate all public nuisances, and the continuance of the evil may be restrained by injunction (*Attorney-General* v. *Johnson*, 2 Wils. Ch. 87 ; *Attorney-General* v. *Burridge*, 10 Price, 350 ; *Attorney-General* v. *Parmeter*, 10 Price, 378 ; *R.* v. *Grosvenor*, 2 Stark. 511 ; *Attorney - General* v. *Earl of Lonsdale*, L. R. 7 Eq. 377 ; 38 L. J. Ch. 335).

Where the Crown seeks to recover an alleged encroachment on the sea-shore, the defendant may either dispute or admit the Crown's title to the actual existing foreshore, that is, to the land lying between the actual present high and low water marks. And if that title be disputed the Court will usually direct an issue to try it before proceeding to ascertain the ancient foreshore, or how far the ancient high water mark extended inland ; and upon the trial of the issue as to title, the defendant will be taken to have admitted that the soil on which the alleged encroachment has been made is part of the foreshore, and so will, in effect, have proved the case of the Crown in the event of his afterwards failing to satisfy a jury that a grant of the foreshore ought to be presumed (*m*). But if the defendant admits the title of the Crown to the actual existing foreshore, that is, to the land lying between the actual present high and low water marks, an inquiry as to what is the boundary of the foreshore will at once be directed, in which case the burden of showing that the high water mark in former times extended further inland than at present is upon the Crown (*n*).

It is no defence to an indictment for a nuisance in a navigable river that, although the work hinders navigation, it is advantageous in other respects to the public (*o*) ; but no indictment would lie for a nuisance in a public river, where the injury to the navigation was only slight and of rare occurrence (*p*).

The owner of a vessel that has sunk by unavoidable accident in a navigable river is not liable to an indictment

(*m*) *Attorney-General* v. *Chamberlaine*, 4 K. & J. 292.

(*n*) *Attorney-General* v. *Chamberlaine*, 4 K. & J. 292. See also *Attorney-General* v. *Rees*, 4 De G. & J. 55.

(*o*) *R.* v. *Ward*, 4 A. & E. 384 ; *Attorney-General* v. *Terry*, L. R. 9 Ch. 423 ; 30 L. T. 215 ; 22 W. R. 395 ; disapproving *R.* v. *Russell*, 4 B. & C. 566.

(*p*) *R.* v. *Tindall*, 6 A. & E. 143 ; 1 N. & P. 719 ; *Harrison* v. *Southwark and Vauxhall Water Company*, 2 Ch. 409 ; *United Alkali Company* v. *Simpson*, 2 Q. B. 116 ; *Gaunt* v. *Fynney*, L. R. 8 Ch. 8 ; 42 L. J. Ch. 122 ; 27 L. T. 519 ; 21 W. R. 129.

for not removing the wreck, but it is his duty to use every reasonable means to prevent it causing injury to other vessels by their coming into collision with it, so long as he continues to have the possession, or to retain the ownership, of the wreck: his obligation in that regard, however, is released on an abandonment by him of the wreck (*q*).

Where a private individual sustains special damage from an obstruction or other nuisance in a public river or on the shore, he may, in general, sue the offender either at law or in equity, and obtain an injunction to restrain the continuance of the obstruction or nuisance (*r*), in addition to recovering the special damage. The remedy by action, however, is not in all cases available, for under certain circumstances the proper remedy is the prerogative writ of *mandamus:* Thus, where the plaintiff's barge, while navigating a part of an ancient navigable river, struck upon one of several submerged piles, and was injured, and the defendant was a conservancy board consisting of unpaid trustees appointed in aid of the common law right of navigating an ancient highway and on behalf of the public, it appeared by the Board's Acts that the duty of removing obstructions in the river was left to the discretion of the board, and it was held that no action lay, but that a *mandamus* to the board to remove the obstruction was the proper remedy when it was plain that the duty of removing obstructions in the river was left to the discretion of the board under statutory provision (*s*).

(*q*) *R.* v. *Watts*, 2 Esp. 675; *Harmond* v. *Pearson*, 1 Camp. 515; *Brown* v. *Mallett*, 5 C. B. 599; 17 L. J. C. P. 227; 12 Jur. 204; *White* v. *Crisp*, 10 Exch. 312; 2 C. L. R. 1215; 23 L. J. Exch. 317; *Hancock* v. *York Rail. Co.*, 10 C. B. 348.

(*r*) *Attorney-General* v. *Lonsdale*, L. R. 7 Eq. 377; 38 L. J. Ch. 335; *Edlestone* v. *Crossley*, 18 L. T. (N.S.) 15; *Norbury* v. *Kitchen*, 18 L. T. (N.S.) 501.

(*s*) *Forbes* v. *Lee Conservancy Board*, 4 Exch. Div. 116; 48 L. J. Exch. 402; 27 W. R. 688. See also *Attorney-General* v. *Great Eastern Rail. Co.*, L. R. 6 Ch. 572; 19 W. R. 788.

THERE MAY ALSO BE OBSTRUCTIONS IN THE SEA OR IN NAVIGABLE TIDAL RIVERS THAT ARE LEGALISED by statute; in other words, purprestures are sometimes sanctioned by Act of Parliament: Thus, weirs in rivers are legal, where they have been erected before the reign of Edward I., according to the well-known provision of Magna Charta (*t*); so weirs in the sea may, *semble*, be erected, under a licence from the Crown, after an inquiry *ad quod damnum* (*u*); again, lines of railway may, where the provisions of the Railways Clauses Consolidation Act, 1845 (*x*), are complied with, be carried across navigable tidal rivers, or may be constructed on and along the sea-shore, or on and along the tidal shore of navigable rivers; and may be carried across private rivers,—and the courses of private rivers may even be altered in the construction of the railway; and River Conservancy Boards, Harbour Boards, and the like, are respectively authorised by statute to interfere variously with the sea-shore and with the banks of navigable tidal rivers (*y*).

(*t*) 25 Edw. 3, c. 4; *Williams* v. *Wilcox*, 8 A. & E. 314; 3 N. & P. 606; 1 W. W. & H. 477; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135; 31 W. R. 622.

(*u*) Moore on the Sea-shore, pp. 104, 105.

(*x*) 8 & 9 Vict. c. 20.

(*y*) **River Conservancy Boards** are, in general, constituted for the protection of navigation and of fisheries only; and they have not, in general, any right to the soil or bed or banks of the river vested in them (*Lee Conservancy Board* v. *Button*, 12 Ch. D. 383; *River Lee Navigation* v. *Button*, L. R. 6 App. Cas. 685); but the bed of the river Thames is vested for certain purposes in the Thames Conservancy (*Thames Conservators* v. *Victoria Station Rail. Co.*, L. R. 4 C. P. 59; *Thames Conservancy* v. *London Port Sanitary Authority*, L. R. 1 Q. B. 647), under and by virtue of the statutes 20 & 21 Vict. c. cxlvii., commonly called the Thames Conservancy Act, 1857, and 57 & 58 Vict. c. clxxxvii., commonly called the Thames Conservancy Act, 1894, upon trust for the Crown as to one-third of the profits, and upon trust to apply the other two-thirds of such profits towards the conservation of the river, and in protection of the navigation and fishing (*Pearce* v. *Bunting*, L. R. 2 Q. B. 360); and the bed of the river Severn is stated to have been at one time parcel of the great manor of Berkeley (Moore on the Sea-shore, pp. 166, 167), but that the lords of the

J. Sea-walls and river embankments.—PRESERVATION OF, IN GENERAL.—The preservation of walls and embankments by or along the sea-shore, and all rivers, streams, sewers and water-courses which are, or may be, navigable (*z*), and the removal of obstructions in such rivers, are duties devolving for the most part on the Commissioners of Sewers, under and by virtue of certain Acts of Parliament, called the Statutes of Sewers (*a*), which, however, are in fact only confirmatory of the common law, except in so far as they enlarge the powers of the commissioners who are empowered by them to order the construction of new works as well as the repair of ancient ones (*b*).

Manifestly, none of the provisions contained in the divers commissions of sewers supersede the right and duty of the Crown, as such, to protect the sea-shore against the inroads of the sea: Thus, it has been said that the various

adjacent manors on either side thereof now have the soil of the river *usque ad medium filum aquæ* (Moore on the Sea-shore, pp. 353, 354); again, the Clyde Trustees have rights of navigation and other rights over the river Clyde, although the title to the foreshore thereof is in a private individual (*Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770), thus, the trustees being empowered by statute to dredge the bed of the river to a depth of seventeen feet, cannot be restrained by injunction from so doing on and opposite to such individual's foreshore (*Lord Blantyre* v. *Clyde Navigation Trustees*, 6 App. Cas. 273), for the proper remedy would be for compensation for damage.

(*z*) **A stream or sewer has been held not to be within a commission of sewers unless it be navigable,** or communicates with a navigable stream, or with the sea, above the point where the tide ebbs and flows, if the place over which jurisdiction is claimed is, or is likely to be, benefited by the action of the commission (*Yeaw* v. *Holland*, 2 W. Bl. 717); in other words, the commission extends to all streams or sewers necessary or useful in navigation (*Dove* v. *Gray*, 2 T. R. 358). See also *R.* v. *Hide*, Sty. 60.

(*a*) These statutes are principally the following:—23 Hen. 8, c. 5; 3 & 4 Edw. 6, c. 8; 13 Eliz. c. 9; 7 Anne, c. 10; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50, and 24 & 25 Vict. c. 133.

(*b*) *Hudson* v. *Tabor*, L. R. 1 Q. B. D. 225.

statutes of sewers, beginning with the statute of 6 Hen. 6. c. 5, *do but regulate the exercise of the prerogative* to defend the realm against the inroads of the sea, and prescribe the forms of commissions for the ordering and execution of the necessary works, and that in early times, the king probably ordered the construction of such sea-walls as he judged necessary very much according to his own discretion (*c*) ; again, in an action by the Crown as owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the defendant, the owner of the foreshore, from removing shingle therefrom so as to expose the plaintiff's land to the inroads of the sea, and this although the shingle was removed for sale in a natural and ordinary way ; and it was stated that it was the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers, and that this duty on the part of the Crown gave rise to a correlative right on the part of the subject ; that is to say, the subject had the right to have a natural barrier kept and maintained where it was, or else to have a corresponding barrier in lieu of it, and consequently that no subject was entitled to destroy a natural barrier against the sea, or, in other words, he had no right to do that which on the part of the Crown would be a wrongful act or to do an act which it would be the duty of the Crown immediately to correct ; and that if caused an injury by the destruction of such natural barrier,

(*c*) *Hudson* v. *Tabor*, 2 Q. B. D., pp. 290, 294. In process of time, however, the royal discretion came to be limited by established rules, and at last by statute ; but, prior to any statute, it is laid down by Fitzherbert, De Nat. Brev. 225 E., and assented to by Lord COKE in the case of *The Isle of Ely*, 10 Co. Rep. p. 143, that before the king granted his licence to repair a trench coming from the sea, or to make a new trench there, a writ of *ad quod damnum* "to inquire what damage it will be to the king or others," must have issued ; and without a proper return to such writ, such works could not be done ; and that procedure is wholly inconsistent with the notion that the frontager could at common law be compelled by action to repair any part of such defences.

a neighbouring landowner was entitled to an injunction to restrain it (*d*).

By the principal statute (*e*), certain commissioners were to be named by the lord chancellor, and lord treasurer of England, and the two chief justices, or any three of them; and these commissioners were thereby empowered to survey all walls, streams, ditches, banks, gutters, sewers, gotes, calcies, bridges, trenches, mills, mill-dams, flood-gates, ponds, locks, hebbing-weirs, and other impediments, and to cause the same, in their discretion, to be made, corrected, repaired, amended, put down or reformed, as the case might require; and they were also empowered to inquire, with the aid of a jury (*f*), through whose default the said hurts and damages had happened, and who had any lands or tenements which were endangered by reason thereof, and to tax and assess the wrong-doers towards such repairs and amendments as were wanted; and they were also empowered to re-form, repair, and make the said walls, ditches, banks, and sewers, in all places where it was thought necessary, and also to cleanse and purge the said trenches, sewers, and ditches, and to remove all such mill-dams, weirs, and other impediments and annoyances as should be found excessive

(*d*) *Attorney-General* v. *Tomline*, 12 Ch. D. 214; 14 Ch. D. 58, wherein it was said by JAMES, L.J., that "when the land was the land of the Crown,—as all land in this country is presumed, in point of law, to have been at one time,—beyond all question it would have been a wrong on the part of the Crown wilfully to have removed this barrier. When the land was transmitted by grant to a subject, the subject could not do that which would have been a wrongful act on the part of the Crown if the land had remained in possession of the Crown. And upon common principles of law, where there is such a natural protection as this,—a barrier against the encroachments and inroads of the sea,—any person who wilfully removes that natural barrier *so as to occasion damage to his neighbour*, would be guilty of a nuisance; and if a nuisance, it would give a right of action to the person who suffered from it."

(*e*) 23 Hen. 8, c. 5.

(*f*) *Wingate* v. *Waite*, 6 M. & W. 739; *R.* v. *Warton*, 2 B. & S. 719.

or hurtful (*g*). And for the purpose of carrying their commission more effectually into execution, full power and authority were, by the same statute, conferred upon and vested in the commissioners to make and ordain laws, ordinances, and decrees, and to enforce the same, both upon private individuals and upon the king (*h*).

Pursuant to the provisions of the Act, and by virtue of a commission under the great seal, the Courts of the Commissioners of Sewers were accordingly erected; and these Courts are a court of record, and consequently may fine and imprison for contempt. But these Courts, although they are Courts of great antiquity and invested with an extensive and somewhat arbitrary jurisdiction, are yet but inferior Courts, and as such are amenable to the superior jurisdiction of the King's Bench Division of the High Court of Justice.

By the Sewers Act, 1833, it was provided that all laws, decrees, and ordinances, which were duly registered, were to continue in force and effect, notwithstanding the determination of the commission under which they were made, and notwithstanding they had not been certified into the Court of Chancery and the royal assent thereto had, as provided for by the Bill of Sewers, until they were repealed by a subsequent Court of Sewers (*i*). And by the Land Drainage Act, 1861, it was declared lawful for the Crown, upon the recommendation of the Inclosure Commissioners, to direct commissions of sewers into all parts of England, —inland as well as maritime,—and to assign the area within which the jurisdiction of each such commission should exercise its jurisdiction; and a commission once

(*g*) 23 Hen. 8, c. 5, ss. 1, 2, 3. See also *R.* v. *Inhabitants of Westham*, 10 Mod. 159; *R.* v. *Bristol Dock Co.*, 6 B. & C. 181; and 24 & 25 Vict. c. 133, ss. 17, 19.

(*h*) 23 Hen. 8, c. 5, ss. 4—6; *Netherton* v. *Ward*, 3 B. & Ald. 21; *Soady* v. *Wilson*, 3 Ad. & E. 248; 3 & 4 Will. 4, c. 22, ss. 53, 55.

(*i*) 3 & 4 Will. 4, c. 22, s. 7. Commissions continued for ten years only under 13 Eliz. c. 9, s. 1, and 3 & 4 Will. 4, c. 22, s. 6.

issued is to continue in force until superseded ; and the Act extends to all commissions of sewers granted even before the Act (*k*).

Again, it was also provided that all walls, banks, culverts, and other defences whatsoever, whether natural or artificial, situate or being by the coasts of the sea, and all rivers, streams, sewers and watercourses, which then were or thereafter should or might be navigable, or in which the tide did or thereafter should or might ebb and flow, or which then did or thereafter should or might directly or indirectly communicate with any such navigable or tidal river, stream or sewer,—and all walls, banks, culverts, bridges, dams, flood-gates, and other works erected or to be erected, in, upon, over, or adjoining to any such rivers, streams, sewers or watercourses,—should be from thenceforth to all intents, constructions, and purposes within and subject to the jurisdiction of the Commissioners of Sewers ; but the commissioners were not to interfere with works theretofore erected for the purpose of ornament in or upon a watercourse, near or contiguous to a dwelling-house, without the consent in writing of the owner or proprietor thereof first had and obtained (*l*). And by the Land Drainage Act, 1861, further powers were given to the Commissioners for the maintenance and improvement of all existing sewers, walls, and other defences against water, and for the construction of new works for the purpose of drainage and irrigation (*m*).

It is also provided that the commissioners may purchase lands for the purpose of enlarging and improving any of their existing works (*n*) ; and there having been theretofore some doubt as to how far the old statutes of sewers warranted the commissioners in constructing entirely new works, it was therefore provided that the commissioners

(*k*) 24 & 25 Vict. c. 133, ss. 2, 4, 14.
(*l*) 3 & 4 Will. 4, c. 22, s. 10.
(*m*) 24 & 25 Vict. c. 133, s. 16.
(*n*) 3 & 4 Will. 4, c. 22, ss. 24—39.

might construct new works, upon obtaining the consent thereto of a certain number of the owners and occupiers within the level (*o*) ; but by the Land Drainage Act, 1861, no purchase is to be made of land for new works, otherwise than by private agreement, unless with the sanction of Parliament first had and obtained in the manner pointed out by the Act (*p*). Moreover, any person who injures or destroys, or who makes away with, any part of the property vested in the Commissioners of Sewers, may be sued, indicted, or otherwise punished (*q*).

By the Land Drainage Act, 1861 (*r*), the commissioners, previously to commencing any new works which will involve an expenditure of £1,000 or upwards, are to cause plans of the proposed works, and an estimate of the expense thereof, to be made, and must publish their intention to execute such new works for at least two months before commencing the same (*s*) ; and if within such period of two months the proprietors of one-half of the area of the land to be rated declare their dissent, the commissioners are to take no further steps, but if no such declaration is made, the commissioners may commence the work, and, out of the rates to be levied by them

(*o*) 3 & 4 Will. 4, c. 22, ss. 19—21.

(*p*) 24 & 25 Vict. c. 133, s. 21.

(*q*) 3 & 4 Will. 4, c. 22, s. 47. See also *Stracey* v. *Nelson*, 12 M. & W. 535.

Commissioners of sewers are not vested with such a property in or possession of the lands generally under their view, cognizance and management as will enable them to maintain trespass for an injury thereto (*Duke of Manchester* v. *Clark*, 2 Moore, 666 ; *Stracey* v. *Nelson*, 12 M. & W. 535), but all property purchased by the commissioners from time to time is vested in them and their successors.

In indictments, informations or complaints respecting offences committed on sewers, the property may be laid or described as that of the commissioners without specifying their names (7 Geo. 4, c. 64, s. 18 ; 3 & 4 Will. 4, c. 22, s. 47 ; 11 & 12 Vict. c. 43, s. 4 ; 42 & 43 Vict. c. 49, s. 39).

(*r*) 24 & 25 Vict. c. 133.

(*s*) 24 & 25 Vict. c. 133, s. 29.

within the area, pay all the expenses incurred (*t*) ; and rates may be levied by the commissioners for defraying all the costs incurred by them, and all their expenses of such new works as aforesaid, but it is expressly provided, that any rate to be levied for the purpose of defraying the expense of improvements or new works involving an expenditure of more than £1,000, shall be deemed to be a special rate, and a tax on the owners of property, that is to say, the "*proprietors*," within the area (*u*). These persons, however, have been held not properly chargeable with expenses incurred by a drainage board in making preliminary surveys and plans for certain proposed works, the estimates for which exceeded £1,000, where the proprietors of one-half of the land dissented from the execution of the works, which were accordingly never carried out, but it was held that a *general* rate on the occupiers of land in the district, in order to pay for the expenses of the surveys and plans was proper (*x*).

It is further provided that the occupier of land adjoining any river or sewer within the statutes of sewers may, within a time specified, take away for his own use the soil, earth, and weeds that have been deposited upon the banks of the river or sewer ; and such soil, earth, and weeds must be removed at least ten feet from the land side of the banks (*y*) ; moreover, if any occupier neglects to remove, within the time specified in the Act, the gravel, soil, and weeds which have been deposited as aforesaid, the commissioners may themselves enter his land and remove them ; and this they are bound to do if the occupier gives them notice to do so (*z*).

The statutes contain also divers provisions fixing the property qualification of the commissioners (*a*) ; regula-

(*t*) 24 & 25 Vict. c. 133, s. 31.

(*u*) 24 & 25 Vict. c. 133, s. 38.

(*x*) *Griffiths* v. *London and Elderfield Drainage Board*, L. R. 6 Q. B. 738.

(*y*) 3 & 4 Will. 4, c. 22, s. 22.

(*z*) 3 & 4 Will. 4, c. 22, s. 23.

(*a*) 3 & 4 Will. 4, c. 22, s. 1.

ting their meetings (*b*) ; enabling them to summon juries to assist them in carrying out the purposes of the Act (*c*) ; and empowering them to enforce by amercement, fine, distress, and sale, the rates, decrees, and orders made by them under the acts (*d*).

The provisions of the Statutes of Sewers do not, of course, interfere with the provisions of any local Acts (*e*), or with the customs of the districts known respectively as the Romney Marsh and the Bedford Level. And with regard to the City of London, there is a separate Commission of Sewers, which by the statute 7 Anne, c. 9, is invested (within its own district) with all the powers and duties of the Commissioners of sewers elsewhere (*f*) ; and the metropolis also formerly had its own separate Commission of Sewers, which, however, was determined by the Metropolis Management Act, 1855, and its property, powers and duties transferred to the Metropolitan Board of Works (*g*), the successor of which is the London County Council, in whom, by virtue of the Local Government Act, 1888, such property, powers and duties are now vested (*h*).

The jurisdiction of the Commissioners of Sewers does not conflict with that of the various rural or urban sanitary authorities established under the Public Health Acts, over sewers provided for the public health (*i*). The Commissioners of Sewers for the City of London are also the sanitary authority for that city, the mayor, com-

(*b*) 4 & 5 Vict. c. 45, ss. 10—12 ; 3 & 4 Will. 4, c. 22, ss. 8, 9.

(*c*) 3 & 4 Will. 4, c. 22, ss. 17, 19, 26 ; 23 Hen. 8, c. 5, s. 1.

(*d*) 3 & 4 Will. 4, c. 22, ss. 53, 55 ; 23 Hen. 8, c. 5, s. 1 ; 7 Anne, c. 10, ss. 1, 3 ; 12 & 13 Vict. c. 50, s. 7 ; 24 & 24 Vict. c. 133, ss. 42—52.

(*e*) *Biglin* v. *Wylie*, 36 L. J. Q. B. 307.

(*f*) See 18 & 19 Vict. c. 120, ss. 145—148.

(*g*) 18 & 19 Vict. c. 120, s. 148.

(*h*) 51 & 52 Vict. c. 41, s. 40 (8).

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55) ; and Public Health Act, 1890 (53 & 54 Vict. c. 59) ; and (for London) Public Health Act, 1891 (54 & 55 Vict. c. 76), amended by the 56 & 57 Vict. c. 47.

monalty, and citizens being, however, the sanitary authority for the Port of London. And by the Land Drainage Act, 1861, provision has been made for the constitution with the consent of the Inclosure Commissioners of *elective drainage districts* throughout the country, and for vesting all matters of drainage (within each district) in a board *having the same powers as the Commissioners of Sewers*,—it being however provided, that no such district may be made (*within the limits of any commission of sewers*) without the *consent of the commissioners* (*k*).

IN ANY PROCEEDINGS UNDER THE STATUTES OF SEWERS, the duty of the jury was, and (when a jury is used) still is, to present the want of repairs generally, and to ascertain who are liable to make them ; but they are not to inquire into the beneficial effect of each particular work (*l*). The presentment of a jury was originally the foundation of the jurisdiction of the sewers commissioners to make a rate for repairs, and without a presentment the rate was void (*m*), but under the Land Drainage Act, 1861, the commissioners may proceed without a jury (*n*) ; and even under the earlier statute (*o*) where it had once been ascertained by a jury that any person was bound to repair a sea-wall or other work, a fresh presentment was not necessary upon any subsequent want of repairs, unless a

(*k*) 24 & 25 Vict. c. 133, s. 63.

(*l*) *R.* v. *Tower Hamlets Commissioners*, 1 B. & Ad. 232.

(*m*) *Wingate* v. *Waite*, 6 M. & W. 739 ; *R.* v. *Mathias*, 2 Jur. 13.

(*n*) 24 & 25 Vict. c. 133, s. 33.

Where it appeared that one of the commissioners who had made an order upon a person to repair a portion of a sea wall fronting his land was personally interested as an owner or "*proprietor*" of lands within the level, it was held that if the commissioners had made the orders under the powers of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 33, they must themselves have found the fact of the person's liability, and if so, would have been acting judicially, and consequently the orders would be invalid because one of the commissioners was disqualified by reason of interest (*R.* v. *Commissioners of Sewers for Fobbing*, L. R. 14 Q. B. D. 561 ; 11 App. Cas. 449).

(*o*) 3 & 4 Will. 4, c. 22, s. 13.

new commission had, in the meantime, issued; or there had been a change of ownership in the lands in respect of which the obligation to repair arose (*p*), or the circumstances had altogether changed, in which cases the commissioners might have inquired into the facts and obtained a fresh presentment: Thus, where it appeared that in the year 1819, a survey was made of certain lands liable to be rated to a drain and the Court of Sewers directed a precept to the sheriff of the county in which the lands lay, requiring him to summon jurors to appear and make their presentment; the jury so summoned, found and presented that certain specified works were absolutely necessary, and that specified lands in the occupations of various persons, received benefit or escaped damage by the drainage, and ought, therefore, to bear the charges thereof; and accordingly assessed a rate which the commissioners confirmed, from which no appeal was made, but a special law of sewers was inrolled in 1823 containing the presentment, under which all rates were made until the year 1837; and it also appeared that in the year 1840 a new commission of sewers issued, by virtue of which in 1841, it was ordered that all laws, acts, deeds, constitutions, and ordinances of sewers held for the county wherein the lands were, which had not been repealed, altered, or superseded, should be confirmed and stand in full force, and that in the years 1846, 1847, and 1848, the commissioners authorised a rate according to the above-mentioned survey and without any new presentment of a jury, it was held that the confirmation in 1841 of the special law of 1823 rendered the presentment of 1819 operative and applicable to the rates in question, which consequently were valid, but it was, however, allowed by the court that upon a representation that circumstances had, since the presentment, changed, the commissioners might have inquired into the facts and obtained a fresh presentment (*q*).

(*p*) *R.* v. *Warton*, 2 B. & S. 719; *R.* v. *Commissioners of Sewers for Fobbing*, 14 Q. B. D. 561; 11 App. Cas. 449.

(*q*) *Taylor* v. *Loft*, 8 Exch. 269.

Where several persons are liable to repair a sea-wall which has become dilapidated, a separate and distinct presentment against each person is not necessary, but the jury may in one presentment allege what are the several defaults in the wall, and who are the parties liable to repair them; and after twenty-eight days' notice, each person charged may traverse the allegation in the presentment as to his liability, and trial shall thereupon be had of such traverse, exactly as if each person had been separately presented as liable to make the said repairs (*r*).

Distinct rates for each separate district or level may be made (*s*), and should be made where the lands in one level receive no benefit from the sewers in the adjoining levels (*t*); but one uniform rate for the whole area drained may be assessed when several levels are drained by one united system of sewers (*u*), and where the commissioners have in the exercise of their statutory powers partitioned any district into sub-districts the rates should be apportioned in accordance with the partition (*x*).

INDIVIDUAL LIABILITY TO REPAIR.—An individual, corporation, or locality may be liable to repair a sea-wall by prescription (*y*): Thus, a person will be bound by prescription to repair a sea-wall where the previous owners of the estate he has have time out of mind repaired such wall; but a frontager in a level, liable by prescription to

(*r*) 3 & 4 Will. 4, c. 22, s. 46.

(*s*) 3 & 4 Will. 4, c. 22, s. 14.

(*t*) *R.* v. *Tower Hamlets Commissioners*, 9 B. & C. 517.

(*u*) *St. Katherine Dock Co.* v. *Higgs*, 10 Q. B. 641; *Emmerson* v. *Saltmarshe*, 7 Ad. & Ell. 266.

(*x*) 12 & 13 Vict. c. 50, ss. 1, 2.

(*y*) *Hudson* v. *Tabor*, L. R. 1 Q. B. D. 225; 2 Q. B. D. 290.

Evidence of prescriptive liability.—A prescriptive liability to maintain a wall for the benefit of adjoining landowners is not established by evidence that a frontager has always maintained a wall in front of his own land, and that no frontager has ever thought it necessary to erect a wall or bank to protect himself from the water coming from his neighbours' land (*Hudson* v. *Tabor*, L. R. 1 Q. B. D. 225; 2 Q. B. D. 290).

maintain and repair a sea-wall with respect to such portions thereof as respectively front his land, is not particularly liable to repair damage thereto if destroyed by an extraordinary storm and high tide, when such portions were previously in good repair and in proper condition to resist the flow of ordinary tides and the force of ordinary storms, in the absence of evidence showing that the prescriptive liability of a frontager extends to the repair of damages caused by the extraordinary violence of the sea, but the liability to repair the damage thus caused to the wall falls upon the whole of the level (*z*).

Again, where there is a *custom* in a locality that all those whose lands abut upon the sea shall do the repairs, those who have lands fronting the sea will be liable by *custom* (*a*).

A condition annexed to a person's estate may bind him to repair (*b*); or a person may be bound by his covenant, which will bind his heirs to the extent to which they have assets by descent or purchasers from him having constructive notice thereof, or even without notice if the covenant operates to make the expenses of the repairs a charge on the land (*c*): Thus, to give an illustration of this liability, where lands which had been held in undivided shares were partitioned by a deed containing a covenant that the expense of keeping and maintaining the walls and gutts of and belonging to the lands thereby partitioned, should be borne by the owners thereof, and should be payable out of the said lands by an acre-scot, it was held that certain subsequent purchasers of parts of the lands, although they had no actual notice of this covenant, were nevertheless bound thereby and liable to contribute to the repair of the sea-wall along the sea boundary of

(*z*) *R.* v. *Commissioners of Sewers for Fobbing*, 14 Q. B. D. 561; 11 App. Cas. 449; following *Keighley's Case*, 10 Rep. 139; *R.* v. *Commissioners of Sewers for Somerset*, 8 T. R. 312.

(*a*) Callis, 114.

(*b*) *Henley* v. *Mayor of Lyme*, 5 Bing. 91; 3 B. & Ad. 77.

(*c*) Callis, 118.

lands not purchased by them, although also liable to contribute to the maintenance of the sea-walls along the boundaries of the levels in which the purchased lands were situated (*d*). Moreover, it also seems the rule that where an occupier of land within the jurisdiction of the commissioners covenants to pay all assessments, charges, and taxes towards the reparation of the premises, the commissioners should take notice of this covenant, and ought to assess the expenses of repairing and rebuilding sea-walls and sewers upon him, and exempt those whom he has bound himself to relieve; though if a stranger enter into such a covenant, the rule is otherwise, for the commissioners know nothing of him (*e*). When there is either no covenant at all between landlord and tenant, or the covenant between them does not extend to the sewer rates, the annual and other small charges are generally assessed upon the tenant, and the expenses for permanent repairs upon the landlord (*f*).

(*d*) *Morland* v. *Cook*, L. R. 6 Eq. 252, in which case it was said that a purchaser of lands situated below the level of the sea was in general bound to inquire how all the defences necessary for the protection of the property against the encroachments of the sea were maintained.

(*e*) *Commins* v. *Massam*, March, 196; Callis, 119, 120.

(*f*) Callis, 140—144; Woolrych on Sewers, 109.

A covenant to pay all parliamentary taxes has been held not to extend to sewer rates (*Palmer* v. *Earith*, 14 M. & W. 428). See also *Brewster* v. *Kitchel*, 2 Salk. 616.

A covenant to pay all rates, taxes and other charges would probably extend to sewer rates (*Smith* v. *Robinson*, [1893] 2 Q. B. 53).

A covenant to pay all outgoing rates and scots includes sewers rates for the reason that in marsh lands *scots* is commonly applied to sewers rates (*Waller* v. *Andrews*, 3 M. & W. 312).

Outgoings.—The word "outgoings," if used in a covenant to pay all taxes, rates, assessments, and outgoings, renders the covenantor liable for repairs to drainage done by order of a local authority, when such a possible liability might have been within the contemplation of the covenantor and covenantee, but the word cannot be construed as applying to an outlay for the permanent

Where any person, body politic or corporate, was at the time of the passing of the Act 3 & 4 Will. 4, c. 22, liable to repair a sea-wall or other work, by reason of tenure, frontage, prescription, custom, covenant, or grant (*g*), such liability remains notwithstanding the statute; and if the parties liable do not repair after seven days' notice (*h*), the commissioners may, if they think fit, make the repairs themselves without the presentment of a jury (*i*), and assess all expenses and costs upon the defaulters.

Where there is no person liable to repair the damage to a sea-wall, or where the wall has been thrown down without any default of the party bound to repair, the commissioners must assess all persons (*k*) within the level whose lands are likely to receive injury from the overflowing of the waters, or to be benefited by the repairs (*l*), —and this is upon the maxim *Qui sentit commodum, sentire debet et onus;* but in accordance with the same maxim,

improvement of the property in circumstances rendering such a construction an outrage on common sense (*Stockdale* v. *Ascherberg*, 19 T. L. R. 457).

(*g*) **A grant of property or a gift of money upon trust,** by and out of the profits and produce or income thereof, to repair and maintain a sea-wall, is a grant or gift in perpetuity and is in the nature of a charity, for the benefit of the inhabitants generally of the district, and not merely of the individual grantees or donees (*Wilson* v. *Barnes*, 38 Ch. D. 507).

(*h*) **The statute gives a cumulative form of proceeding,** and does not take away the powers conferred upon the commissioners by statute 23 Hen. 8, c. 5 (*R.* v. *Baker*, L. R. 2 Q. B. 621).

It is said that independently of prescription no owner of land fronting the sea, and liable to be overflowed by it, is at common law bound to keep out the sea for the benefit of adjoining land owners as a matter of public good (*Hudson* v. *Tabor*, 1 Q. B. D. 225). But see *Keighley's Case*, 10 Co. Rep. 139; and Year Books, 18 Edw. 3, p. 23.

(*i*) *R.* v. *Baker*, L. R. 2 Q. B. 621, 629.

(*k*) *Tracey* v. *Taylor*, 3 Q. B. 966; *Neave* v. *Weather*, 3 Q. B. 984.

(*l*) *Keighley's Case*, 10 Rep. 139 a; *R.* v. *Commissioners of Essex*, 1 B. & C. 477; *R.* v. *Commissioners for Somerset*, 8 T. R. 312; *Rooke's Case*, 5 Rep. 100 a; *Soady* v. *Wilson*, 3 A. & E. 248.

and as the converse thereof, no person can be rated (apart from statute) whose property will not be benefited directly or indirectly by the reinstatement of the wall (*m*); and therefore persons inhabiting high grounds which the waters cannot possibly reach, cannot (apart from statute) be called upon to contribute to the rate (*n*). For the same reason, it is said that the sea-shore and derelicted lands and islands are exempted; because unless and until they are brought under cultivation, they can receive no benefit from the operations of the commissioners (*o*).

The benefit need not be immediate, nor do the cases, or the commission itself or the statutes say anything of its nature or amount, but it may be either extremely small or of high value (*Soady* v. *Wilson*, 3 A. & E. 248).

(*m*) *Biglin* v. *Wylie*, 36 L. J. Q. B. 307; *Neave* v. *Weather*, 3 Q. B. 984; *Stafford* v. *Hamston*, 2 B. & B. 691; *Soady* v. *Wilson*, 3 Ad. & E. 248; *Anselm* v. *Bernard*, 3 Keb. 675; *R.* v. *Wright*, 2 Keb. 42; *Isle of Ely Case*, 10 Rep. 142.

(*n*) *Masters* v. *Scroggs*, 3 M. & S. 447; *Stafford* v. *Hamston*, 5 Moo. 608; 2 B. & B. 691.

(*o*) Callis, 54, 61.

CHAPTER III.

A. Fences, hedges, and ditches in general. Fences, although occasionally used as boundaries for the division of property, are properly guards against intrusion.

A fence may consist of almost any kind of inclosure or division; but a fence most commonly consists of a hedge, ditch, bank, or wall (*a*).

An impression prevails in certain country districts, that the owner of a boundary fence, consisting of a bank with a ditch on the outside of it, is entitled to four feet of width for the base of the bank, and four feet of width for the ditch; and there is doubtless some ground which justifies that impression,—*e.g.*, some so-called custom of the country, or local usage, according to which eight feet, to be taken from the owner's own land, are commonly allowed for a bank and ditch. But apart from any such particular usage or so-called custom, there is no rule about four feet and eight feet; and the rule of law is that no man making a ditch can cut into his neighbour's soil, although he may cut to the very extremity of his own land (*b*).

Proof, therefore, of the ancient width of a ditch is evidence that the boundary line does not extend beyond the outer edge thereof; and this is more especially so, as the owner who made the ditch could not have dug so near his own boundary as to let down his neighbour's soil (*c*).

(*a*) Woolrych on Fences, 281.
(*b*) *Vowles* v. *Miller*, 3 Taunt. 138.
(*c*) *Wyatt* v. *Harrison*, 3 B. & Ad. 871.

Consequently, where two estates are separated by a hedge and single ditch, the presumption is, in the absence of evidence to the contrary, that both ditch and hedge belong to the owner of the land on which the hedge is planted (*d*), —in other words, on whose side of the hedge the ditch is not,—this presumption having reference only to artificial ditches, and not (*semble*) to natural watercourses (*e*). But if there are two ditches, one on each side of the hedge,— or if a bank be raised on both sides of a trench, or if there be an old bank without any apparent trench on either side,—then the ownership of the hedge, ditch, or bank must be ascertained by proving acts of ownership (*f*), such as cleansing the ditch, clipping the hedge, or repairing the bank. Such acts are *primâ facie* evidence, that the party exercising them is the owner of the hedge, ditch, or bank; and if the adjoining owners on each side concurrently exercise acts of ownership, that is evidence of a tenancy in common in the hedge, ditch, or bank. But if it is known what quantity of land each of the adjoining owners originally contributed towards the formation of the ditch or bank dividing their properties, then the original boundary would not be disturbed, but each proprietor would continue to hold his share in severalty (*g*).

Where an inclosure adjoins the public highway, and a ditch is made outside the inclosure, and between it and the highway, the ditch is parcel of the inclosure: Thus, it has been said that, generally speaking, where an inclosure is made, the party making it erects his bank and digs his ditch on his own ground, on the outside of the bank, and that the land which constitutes the ditch is, in point of law, part of the close, though it be on the outside of the bank. Moreover, if something further is done for the party's own convenience, and that which constitutes

(*d*) *Vowles* v. *Miller*, 3 Taunt. 138; *Strang* v. *Steuart*, 4 Sess. Cases, H. of L. 5.

(*e*) *Marshall* v. *Taylor*, [1895] 1 Ch. 641.

(*f*) *Guy* v. *West*, 2 Selwyn, N. P. 1297.

(*g*) Woolrych on Fences, 283.

the fence is dug out from his land,—as, for instance, if a small portion of uninclosed land near a public or private way is left out of the inclosure to protect and secure the occupation of that part of the land which is inclosed,—that also is, in point of law, parcel of the inclosure (*h*).

On the other hand, where the highway is (or originally was) a turnpike road, and the soil thereof was originally vested in the road-trustees, it may be that the ditch has been constructed by them, and that it remains parcel of the road,—and is not parcel of the adjoining inclosure at all (*i*).

B. Erection, maintenance and repair of fences, etc.—IN MOST OF THE STATES OF THE UNITED STATES OF AMERICA (*j*), where two or more persons have lands adjoining, division fences are required by statute to be made and maintained between their lands if inclosed, occupied or improved, and if the occupation or improvement extends up to the line between the adjoining lands: each owner being required to contribute a just proportion of such fence, unless either of them chooses to let his land lie in common; in which case he is remitted to his common law rights and duties, and relieved of his obligation except so far as he has occasion for a fence (*k*). And any differences that may arise regarding boundary fences, are to be settled by fence-viewers, whose duty it is, upon application, to determine the sufficiency and value of any fence erected by a party on account of the default of one liable to contribute to the erection or reparation thereof, who may be sued in damages by the party injured (*l*).

(*h*) *Doe* v. *Pearsey*, 7 B. & C. 307. See also *Noye* v. *Reed*, 1 M. & R. 63.

(*i*) *Searby* v. *Tottenham Rail. Co.*, L. R. 5 Eq. 409.

(*j*) 3 Kent's Comm. 583. See also 12 Am. and Eng. Encyc. of Law, 2nd ed., p. 1050.

(*k*) **As to the common law,** *vide infra*, pp. 58 *et seq.*

(*l*) *Newall* v. *Hill*, 2 Metcalf, 180.

These rules, however, seem to have reference to the first division of the lands among the respective proprietors; and as regards the subsequent ownership of the fence, that would probably be referred to the original several ownerships of the parties (*m*).

BY THE FRENCH CODE, all *ditches* between two estates are presumed to be common, when there is no title or proof to the contrary (*n*). But a ditch is not common when the bank or earth thrown up is found only on one side of it (*o*): for, in such case, the ditch is deemed to belong exclusively to him on whose side the earth is found to be thrown up (*p*): and as regards *hedges* separating two estates, these also are presumed to be common, where there is no title or proof to the contrary; but if it appears that only one of the estates is in an inclosed condition, or that there has been a sufficient possession to prove the contrary, then the presumption would be excluded (*q*).

IN IRELAND the proprietor, occupier, or tenant of any lands may compel the proprietor, occupier, or tenant of the lands adjoining to be at half the expense of making and keeping in repair sufficient ditches and fences between their properties, and of settling the mears and bounds between them: and in case of refusal by the neighbouring proprietor or tenant to make his share of such fences and ditches, the other proprietor or tenant may make them himself, and recover half the expense of so doing, with treble costs; also, the proprietor, refusing as aforesaid, is to have no action for involuntary trespasses by the cattle of the other; but of course, as between landlord and tenant, their contracts (if any) as to fencing, ditching, or inclosing any lands, are not affected by the Act (*r*). And by the further Irish statute,

(*m*) 3 Kent's Comm., 583, 584, and the notes. See also *Vowles* v. *Miller*, 3 Taunt. 138.

(*n*) Article 666.

(*o*) Article 667.

(*p*) Article 668.

(*q*) Article 670.

(*r*) 8 Geo. 1, c. 5.

after reciting that farms and lands are often divided by double ditches, and that disputes frequently arise relative to the property in such double ditches, and that it would tend to the improvement of such lands, and to prevent such disputes, if the tops of such double ditches were planted with timber trees, it is enacted, that it shall be lawful for the occupiers of lands on either side of such double ditches to plant them with timber trees for their mutual benefit, and at their mutual expense; and that if either party shall refuse to pay his proportion of planting such ditches, having been requested in writing so to do, it shall be lawful for the other party, within twelve months after the service of such request, to plant all such double ditches, and to convert to his own use all such timber trees as shall be planted thereon, if registered pursuant to the statute; and that it shall be lawful for the party so planting to impound any beast caught trespassing on any part of such double ditch, and to recover damages therefor as on his other lands (*s*).

BY THE COMMON LAW OF ENGLAND, EVERY MAN OUGHT OF COMMON RIGHT TO KEEP UP HIS OWN HEDGES (*t*); IT IS HIS DUTY TO DO SO, for his own protection. However, it is not intended by the maxim or rule in question, that every man shall raise some visible or material defence against the adjoining proprietor; for, on the contrary, he may, if he please, leave his own property open, and separated from the land of the neighbouring owner, by nothing but the ideal invisible boundary which exists in contemplation of law, and which bounds every man's land, and is his fence (*u*); and, therefore, a landlord who lets a portion of his land, is under no duty to erect a visible fence between the land let and the land retained by him (*v*). But as every man is

(*s*) 40 Geo. 3, c. 71.

(*t*) 2 Roll. Rep. 289.

(*u*) *Star* v. *Rokesby*, 1 Salk. 335; 3 Bl. Com. 210.

(*v*) *Erskine* v. *Adeane*, L. R. 8 Ch. 756. See also *Wilson* v. *Newberry*, L. R. 7 Q. B. 31; and distinguish *Crowhurst* v. *Amersham Burial Board*, 4 Exch. D. 5.

bound not to trespass upon the land of another, so he is bound to keep his beasts from trespassing also : for if, by his negligent keeping, they stray upon the land of another, and they there tread down his neighbour's herbage, and spoil his corn or his trees, or do any other damage there, *e.g.* to a pony lawfully there (*x*), this is a trespass, for which the owner must answer in damages ; and the law gives the party injured a double remedy in such case, permitting him to distrain the cattle thus *damage feasant*, till the owner shall make him satisfaction, or else leaving him to sue such owner for damages (*y*). And therefore it is, that by the common law a man who erects a visible boundary fence, erects it for his own protection.

Where a man sells portion of his property, the contract of sale should provide expressly as to who is to maintain the boundary fence between the portion sold and the part retained : if the contract is silent upon the subject, a question as to the duty of maintaining the fence may arise, and the authorities are not in unison with respect thereto (*z*) : but according to Dyer (*a*), if a man seised of 200 acres enfeoffed another of fifty acres, the feoffee was bound to enclose them and to keep his cattle within the fifty acres, and so was the lord of the residue ; that is to say, as between the vendor and the vendee, each (so far as regards his own protection), must put up his own fence ; and neither of them is bound to inclose for the benefit of the other.

Another question which arises is this,—can the right of one owner to require his neighbour to make (and thereafter to maintain) a fence arise by prescription ? And clearly, it may (*b*) : but the prescription is difficult to

(*x*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

(*y*) 3 Bl. Com. 211 ; *Boyle* v. *Tamlyn*, 6 B. & C. 337 ; *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

(*z*) *Doyle* v. *Drake*, Moore, 775.

(*a*) Page 372 b.

(*b*) Fitzherbert, N. B. 128, n ; Com. Dig. Droit, M. 2 ; *Churchill* v. *Evans*, 1 Taunt. 529.

establish ; and the books contain much that is ambiguous relative to the matter, thus, one writer says, there may be a spurious kind of easement obliging an owner of land to keep his fences in repair, not only to restrain his own cattle within bounds, but also to keep out those of his neighbour (*c*) : and it has been said (*d*), that the right to have a fence repaired by the adjoining proprietor is in the nature of a distinct easement affecting his land (*d*),—which easement most usually arises by virtue of some express agreement (*e*), though it may also arise by virtue of prescription, that is to say, by implied agreement. With regard, however, to the implication of any such agreement, it is to be observed, that while, in the case of rights of way, the enjoyment cannot be accounted for, unless an agreement is presumed (*f*) ; in the case of repairs made to a boundary fence by the adjoining owner, the enjoyment is (and all along has been) consistent with the fact of the repairs having been made for his own benefit by the party charged, and in pursuance merely of the obligation which the law imposes upon him to keep his own cattle from trespassing on his neighbour's property (*g*).

A prescriptive right to have fences repaired is not to be presumed from the mere fact of repairs having been made by the adjoining owner, however long a time they may have been continued ; but it is necessary further

(*c*) Gale on Easements, 5th ed., p. 516.

Liability to repair fences not within Prescription Act.—Since it has been decided that the Prescription Act (2 & 3 Will. 4, c. 71) has no application to *mere duties* (*Peter* v. *Daniel*, 5 C. B. 573), it has been said that a liability to repair fences is not an easement falling within the provisions of that Act, and that a prescriptive right to have a fence repaired must accordingly be made out independently of the statute, and by force of the old law as it existed previous to the statute (Gale on Easements, 5th ed., p. 166).

(*d*) *Boyle* v. *Tamlyn*, 6 B. & C. 329, 339.

(*e*) *Hewlins* v. *Shippam*, 5 B. & C. 221.

(*f*) *Doe* v. *Reed*, 5 B. & Ald. 232, 237.

(*g*) *Boyle* v. *Tamlyn*, 6 B. & C. 332.

to go on and show, not only that the person charged has uniformly repaired the boundary fence, but also that he has executed these repairs *upon the requisition from time to time of the party making claim to the easement* (*h*) : Thus, it was held, where the defendant was the occupier of a close adjoining to a close occupied by the plaintiff, and the defendant (his close being woodland) sold the fallage of the timber to H., and H. felled a tree in a negligent manner, so that it fell upon and made a gap in the fence, and two cows of the plaintiff got through the gap from the plaintiff's close into the defendant's close, and died from feeding on the leaves of a yew tree which had been felled there by H., and it appeared that the defendant and his predecessors had for more than forty years repaired the fence between the two closes whenever repairs were necessary and that for the last nineteen years the fence had been repaired by the defendant and his predecessors *upon notice by the occupier from time to time of the plaintiff's close, and for the purpose of preventing cattle on the plaintiff's close from escaping into the defendant's close*, that the evidence showed a prescriptive obligation on the part of the defendant to maintain the fence so as to keep in the cattle in the plaintiff's close ; and that the obligation was absolute, the act of God or *vis major* only excepted, to keep up a sufficient fence at all times, and that *without any notice of want of repair ;* and that the defendant was therefore liable to the plaintiff for the loss of the cows (*i*).

Where prescriptive liability to repair a fence between an ancient inclosure and the waste lands of a manor exists, an inclosure of the waste lands under an Inclosure Act (*k*), does not remove the liability,—*scilicet*, where the Act is silent on the matter of fences, which it rarely is (*l*).

(*h*) *Boyle* v. *Tamlyn*, 6 B. & C. 332.
(*i*) *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274.
(*k*) *Barber* v. *Whiteley*, 34 L. J. Q. B. 212.
(*l*) *Haigh* v. *West*, [1893] 2 Q. B. 19.

Where a person has once become liable by prescription to repair a fence for the benefit of his neighbour, that liability will run with the land, equally as where the liability arises by express grant or agreement (*m*).

Moreover, the liability, when it exists, extends to all the consequences arising from the neglect to make the requisite repairs: Thus, where one was bound to repair fences, it was held, that an action was maintainable against him for the defective state of his fences,—*per quod* another's horses escaped into his close and were there killed by the falling of a haystack (*n*); so where the plaintiff's horse escaped into the defendant's field, through defects in the fences,—which the defendant was bound to repair,—and was there killed by falling into a ditch, it was held that the defendant was liable for the consequences (*o*); again, where the defendant was liable in favour of the plaintiff to fence off his land, and the fence, which was made of wire-rope, decayed through long exposure to the weather, and pieces of it falling to the ground and lying hidden in the grass of plaintiff's close were swallowed by plaintiff's cows, and the cows died in consequence, the court held the defendant liable for the loss (*p*). Also, if cattle escape into an adjoining close through defects in the fences which the tenant of the close is bound to repair, he is not justified in driving them into the highway and leaving them there; for in such case the least to be expected from a party so liable is, that he should put back the cattle into the place in which they were before they quitted it in consequence of his neglect (*q*).

(*m*) *Potter* v. *Parry*, 7 W. R. 182; *Western* v. *Macdermott*, L. R. 2 Ch. 72.

(*n*) *Powell* v. *Salisbury*, 2 You. & Jervis, 391.

(*o*) *Anon.* 1 Ventris, 264.

(*p*) *Firth* v. *Bowling Iron Co.*, 3 C. P. D. 254.

(*q*) *Carruthers* v. *Hollis*, 8 A. & E. 113; 3 N. & P. 246.

It is not necessary that the injury should have happened to a person's own beasts in consequence of defects in fences that an adjoining owner is bound to repair to enable the former to maintain an action against the latter; but the action will equally lie for injury committed to the animals of others in his temporary possession, and even although he may be only a gratuitous bailee of such latter animals: Thus, where A. sent his horse for the night to B., who turned it out after dark into his pasture field,—adjoining to and separated from a field of C. by a fence which C. was bound to repair,—and the horse, from the bad state of the fences, fell from the one field into the other and was killed,—it was held that B., though a gratuitous bailee of the horse, might maintain an action against C. for its value; and it was said that B. was entitled to the benefit of his field not only for the use of his own cattle but also for putting in the cattle of others, and that by the negligence of C. in rendering the field unsafe, he was deprived in some degree of the means of exercising his right of using that field for either of those purposes; and it was also said that, as a gratuitous bailee, B. owed it to the owner of the horse not to put it into a dangerous pasture and that if he did not exercise a proper degree of care, he would be liable for any damage which the horse sustained, and therefore had an interest in the integrity and safety of the animal for a damage done in respect of which he might sue (*r*).

THE OBLIGATION, HOWEVER, IN FAVOUR OF THE OCCUPIER OF AN ADJOINING CLOSE TO REPAIR the fences is an obligation towards such adjoining occupier only, and not towards strangers (*s*), and therefore, a party seeking to take advantage of the obligation, either as excusing a trespass, or as rendering the other party liable for the injuries

(*r*) *Rooth* v. *Wilson*, 1 B. & Ald. 59; *Broadwater* v. *Blot*, Holt, 547.

(*s*) Viner's Abr. *Fences*, D. 4.

sustained, must show an interest in the adjoining close, or a right to have his cattle there (*t*), thus, if the cattle of one man escape into the land of an adjoining occupier, who brings trespass therefor, it is no defence that the fences were out of repair, if such cattle were trespassers in the place from whence they came (*u*). So, where the beasts of one of three adjoining proprietors stray into the close of another of such proprietors for default of repairs by him and therefore are not trespassers there, and from his close stray into the close of the third proprietor for default of repairs by him, it is no defence to the owner of the cattle at the suit of the third proprietor that the plaintiff was bound to repair as against the owner of the close into which the beasts have first entered (*x*).

It appears from Fitzherbert (*y*), that if A. be bound to fence against B., and B. against C., and the beasts of C. escape out of the land of C. into the land of B., and thence into the land of A., A. shall not maintain trespass against C.; but that if A. be bound to fence against B., and the beasts of B. escape into the lands of A., and thence into the lands of D., a stranger, D. may maintain trespass against B., who shall be left to his writ of *de curiâ claudendâ* against A.

Also in Jenkins' Reports (*z*), it is said that if A. has Greenacre adjoining to his own close Whiteacre, which adjoins to B.'s close Blackacre, and which A. ought, as against B., to fence, and B.'s cattle go from his Blackacre to A.'s Whiteacre, and thence to A.'s Greenacre, this is no trespass, because A. did not fence his Whiteacre against B.'s Blackacre.

(*t*) F. N. B. 128, note 3.

(*u*) *Dovaston* v. *Payne*, 2 H. Bl. 526.

(*x*) *Right* v. *Baynard*, 1 Freem. 379; 7 Bac. Abr. *Trespass* (G), 689. See also *Rust* v. *Low*, 6 Mass. 90, 99.

(*y*) Fitz. Abr. 127, n. 6.

(*z*) 4th Cent., case 5.

And, where the plaintiff was owner of close A., and the defendant was owner of closes B. and C.; and between A. and B. there was a fence, which the owner of B. was, as against the owner of A., bound to keep in repair; and between B. and C. there was a sufficient fence; and the cattle of the plaintiff strayed from A. through a gap into B., and then breaking down the fence between B. and C., strayed into C., and were there distrained by the defendant,—it was held, that the distress was unlawful, the trespass having been committed, in the first place, through the defendant's default; and Baron CHANNELL considered that the case was not distinguishable from one in which, if a man were unlawfully to let cattle out of a pound where they were confined, the cattle were afterwards to break through a fence into his own field (*b*).

As the result of these decisions and *dicta*, it may perhaps be stated, that as between A. and B., whenever A.'s trespass on B.'s adjoining inclosure is excused through B.'s own neglect of his duty to repair the fences as against A., then B. shall have no action of trespass against A.,—even when A.'s cattle, beginning to trespass on B.'s adjoining inclosure through his neglect, afterwards extend their trespass to some other close of B.'s not adjoining; also, that where such last-mentioned close is not B.'s but C.'s, but nevertheless, as between B. and C., C. was bound to fence, then also C. shall have no action of trespass against A.,—when A.'s cattle straying on to B.'s land (through B.'s neglect) afterwards extend their trespass to C.'s land,—because the neglect of B. amounts in effect to (and may be construed as) a licence to A.'s cattle to be on B.'s close, and thereby C.'s liability to B. excuseth the trespass of A.; but that when C. is under no liability to B.,—then he may have an action against A. in such case, exactly as he would have had against B.'s cattle, according to the general law.

The cattle of a commoner being lawfully on the common

(*b*) *Singleton* v. *Williamson*, 7 H. & N. 410; 31 L. J. Exch. 17.

cannot be distrained damage feasant when they stray on to an adjoining common, when there has never been any fence between the two commons (*c*).

If a stranger's cattle broke the fences and committed a trespass by coming on the land, they were distrainable immediately by the lessor for the tenant's rent in arrear,—this being the common law, and being in the nature of a punishment to the owner of the beasts for his own negligence (*d*) ; and the same rule applied, if the tenant of the land where the distress was taken was not bound to repair the fences, and the cattle strayed through a defect in them (*e*). But if the lessor (or his tenant) was bound to repair the fences and did not, and thereby the cattle escaped into the inclosure without any negligence or default in the owner, the landlord could not in such case distrain them till they had been levant and couchant on the land (that is, until they had been long enough there to have lain down and risen up to feed, which was in general one night at least), and actual notice had been given to the owner that they were there, and he had neglected to remove them (*f*) ; for the common law would not suffer the landlord to take immediate advantage of his own or of his tenant's wrong in such case (*g*). The grantee also of a rent-charge, or the lord of a manor distraining for a quit-rent, as they have nothing to do with the fences, so they may distrain, without notice, the cattle levant and couchant (*h*).

(*c*) *Hall* v. *Harding*, 4 Burr. 2426 ; *Cape* v. *Scott*, L. R. 9 Q. B. 269.

(*d*) Co. Litt. 47 b ; *Jones* v. *Powell*, 5 B. & C. 649.

(*e*) Co. Litt. 47 b, note 3.

(*f*) Lutwych, 1580.

(*g*) *Elmore* v. *Tucker*, 6 Mod. 198 ; *Poole* v. *Longueville*, 2 Wms. Saunders, 290, note 7 ; *Boden* v. *Roscoe*, [1894] 1 Q. B. 608 ; *Haigh* v. *West*, [1893] 2 Q. B. 19.

(*h*) Co. Litt. 47 b, n. 3 ; *Kimp* v. *Crewes*, 2 Lutw. 1580 ; *Poole* v. *Longueville*, 2 Wms. Saunders, 290.

A man is not bound to fence against his own land; and where a man is bound to fence against land, and he purchases that land, he is no longer bound to maintain the fences (*i*); and if A. is bound to inclose against B., who has twenty acres adjoining, and A. purchases one acre adjacent to the inclosure, A. is not compellable to inclose against that one acre (*k*). The duty of fencing becomes in fact extinguished by the unity of possession and ownership; and if the two closes should afterwards come again into several ownerships, by becoming vested in different owners, though things of necessity shall in such case revive, as a way to market or to church, yet in the case of easements not of necessity the rule is otherwise, and the duty of fencing will therefore not revive, a fence not being of necessity (*l*).

Mere unity of *possession* will not destroy, but at the most will suspend merely, the obligation to repair the fence between two properties; and to destroy that obligation, there must be unity of *ownership* as well, and the owner must have an equally *perdurable* estate in both the tenements (*m*).

(*i*) Viner's Abr. *Fences*, (A) 1; *Sackville* v. *Milward*, 22 H. 6, 7, 8.

(*k*) Viner's Abr. *Fences*, D (3); *Marfell* v. *South Western Rail. Co.*, 8 C. B. (N.S.) 525.

(*l*) *Polus* v. *Henstock*, 1 Ventris, 97; Popham, 172; Viner's Abr. *Extinguishment*, C. 12.

(*m*) Co. Litt. 114 b; *Canham* v. *Fisk*, 2 Cr. & J. 126; *Thomas* v. *Thomas*, 2 Cr. M. & R. 41; *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Barkshire* v. *Grubb*, 18 Ch. D. 616; *Brown* v. *Alabaster*, 37 Ch. D. 490.

In *R.* v. *Inhabitants of Hermitage*, Carth. 239, where it appeared that King Henry VIII. was seised of the tenements in Hermitage in fee simple absolute *jure coronæ*, and that the occupiers of those lands had a prescriptive right to pasture their beasts on Hermitage Common, which was parcel of the duchy of Cornwall, but for want of a duke of Cornwall, had come into the possession of the king, so that he held the lands of Hermitage and Hermitage Common together; and it was contended that the right of common was extinct by the unity of ownership,—the court held that this was

Apparently also, if the statutory period required by law for gaining the prescriptive right is not completed when the unity of possession occurs, it will be necessary to commence afresh reckoning the period when the unity of possession is ended; for while such unity of possession continues, the time does not run in favour of the incomplete prescriptive title, the reason being that, during the period of such unity of possession, the boundary fences cannot have been maintained by the occupier by virtue of any *legal obligation*, no man (as above is stated) being bound to fence one part of his property from another part (*n*).

Sometimes two persons have the concurrent possession of land, for the purpose that each may take profits of a special nature, or of a limited kind, or for a limited or prescribed period; and as regards the liability to fence in such case, the circumstances of the case and the respective and relative rights of the parties require to be carefully considered; but upon the general question, reference may be made to a case (*o*) in which it appeared that certain lands were granted out on lease to an Indian tribe, the grantor retaining an easement in himself to enter and depasture the lands granted; and the Indians were to have the right, during certain fixed periods of the year, of

not such a unity of ownership as would destroy the prescription; HOLT, C.J., stating as follows: Though King Henry VIII. had an estate in fee in the lands to which the common of pasture appertained, and also in Hermitage Common, yet he had not as *perdurable* an estate in the one as he had in the other; for the quality of the estates differed, Hermitage Common being part of the duchy of Cornwall, and the king had in it only a fee determinable on the birth of a duke of Cornwall, which is a base fee; but in the tenements in Hermitage, he had a pure fee simple indeterminable; and an unity of such estates worked no extinguishment,—for where an unity of ownership extinguishes a prescriptive right, the two estates must be equal in duration, in quality, and in all other circumstances of right.

(*n*) *Clayton* v. *Corby*, 2 G. & D. 174; *Boyle* v. *Tamlyn*, 6 B. & C. 329; 9 Dow. & Ry. 403.

(*o*) *Rose* v. *Bunn*, 7 Smith (N.Y.) 275.

ploughing and planting such arable parts of the tract granted as they might select, with general liberty to take timber for fencing without restriction ; and it was held that the duty of fencing lay on the grantees, and that in case of defects in the fences, such grantees could not distrain the grantor's cattle damage feasant.

And where the defendant, who was the landlord of a house let out in apartments to several tenants, allowed each tenant the privilege of using the roof of the house (which was a flat roof with iron rails round its outer edge), for the purpose of drying their linen,—the access to the roof being by means of a low door at the stair head about two feet from the rail,—and the plaintiff, the occupier of one of the rooms, went upon the roof for the purpose of removing some linen, when his foot slipping and the rail being out of repair (and known by the landlord so to be), he fell through to the courtyard below and was injured, the court held that the mere licence to the lodgers to use the roof as a drying ground,—such licence being a thing quite distinct from the letting, and wholly gratuitous,—imposed no duty upon the defendant to fence it or to keep the fence in repair (*p*).

C. Fences inclosing waste lands.—The lord of a manor may, subject to the provisions of the Commons Acts, 1876 and 1893, approve by inclosing portions of the waste, if he leave sufficiency of common for the tenants, but if he inclose the entire waste by a fence, hedge, or wall the tenants, if unable to reach the waste without prostrating the fence, may prostrate the fence ; and this right is not confined to prostrating such portion only of the fence as will enable them to exercise their rights, but they may lawfully prostrate the whole fence (*q*), although

(*p*) *Ivay* v. *Hedges*, 9 Q. B. D. 80.

(*q*) *Arlett* v. *Ellis*, 7 B. & C. 346 ; 9 B. & C. 684 ; 2 Inst. 88 ; Bro. Abr. tit. Common, pl. 9.

they are not putting their beasts in at the time (*r*). This right of prostration is sometimes called the remedy of abatement; but before abatement, a previous request is in all cases advisable (*s*), and when the fences have once been prostrated, the question of legal right may afterwards be decided in an action (*t*).

The same principle applies where a fence or wall is erected on the common itself,—so that a part only of the common is interfered with (*u*); if, however, the inclosure is not made on the common itself, but is on other lands surrounding it, the tenant is not justified in pulling down more than is sufficient to enable him to have a way to the land where the common is (*x*).

Where an approvement has taken place, and the land approved has been granted out by the lord, the liability to maintain the fences between the inclosure and the waste lands of the manor is upon the lord's grantee,—just as after approvement it was on the lord himself,—and no duty to maintain the fences is, in such a case, upon the commoners, and such liability is not taken away by the inclosure of the common under an Inclosure Act or otherwise, for agreements among commoners themselves ought not to affect the liability of third parties: Thus, where the grantee of an ancient inclosure had from time to time repaired the fence between the inclosure and the common, which afterwards was inclosed by virtue of an Inclosure Act, it appeared that some sheep which had strayed through the fence out of the adjoining allotment had been distrained damage feasant, and in an action of replevin brought to recover them, the distress was held unlawful upon the ground that the circumstances in which the inclosure originated led to a reasonable inference of an *obligation* on the part of the owner of the

(*r*) Com. Dig. (Common H.).
(*s*) 1 Chit. G. P. 396; 1 Wms. Saunders, 353 b, c.
(*t*) *Arlett* v. *Ellis*, 7 B. & C. 378.
(*u*) *Mason* v. *Cæsar*, 2 Mod. Rep. 65.
(*x*) Bro. Abr. tit. Common, pl. 9; Year Book, 15 H. 7, 10 b.

ancient inclosure to repair, and that the obligation was coeval with the transaction, and flowed from the possession of the land and the terms on which that possession was permitted by the lord (*y*).

This general rule, of course, may be varied by the provisions of the Inclosure Act itself, and these provisions are usually expressed with minute particularity (*z*).

(*y*) *Barber* v. *Whiteley*, 34 L. J. Q. B. 212; *Wells* v. *Veasey*, 1 Bing. N. C. 556; *Lee* v. *Riley*, 13 W. R. 751.

(*z*) *Cowley* v. *Wellesley*, 35 Beav. 641.

CHAPTER IV.

A. Fences between railways and the adjoining lands.—By the Railways Clauses Act, 1845 (*a*), it is enacted, that, subject to the provisions and restrictions contained in the Act and in any special Act or Acts incorporated therewith, it shall be lawful for any railway company, for the purpose of their railway or the accommodation works required to be executed therewith, to make or construct, in, upon, across, under, or over any lands or streets, hills, valleys, roads, railroads, tramroads, rivers, canals, brooks, streams, or other waters (*b*) within the lands described in the deposited plans or mentioned in the books of reference thereto or in any correction thereof, such fences as they think proper; and they may from time to time alter, repair or discontinue them, and substitute others in their stead, and do all other acts necessary for making, maintaining, altering or repairing, and using the said railway (*c*),—the company nevertheless, in the exercise of the powers granted to them, doing as little damage as possible, and making full satisfaction in the manner pointed out by the Act for all injury done by them in the exercise of such powers (*d*). And by the same Act (*e*), the company is required to make,

(*a*) 8 & 9 Vict. c. 20, s. 16.

(*b*) *Abraham* v. *Great Northern Rail. Co.*, 16 Q. B. 586.

(*c*) *R.* v. *Wycomb Rail. Co.*, L. R. 2 Q. B. 310, 320, 325; *Sadd* v. *Maldon Rail. Co.*, 6 Exch. 143.

(*d*) *R.* v. *Eastern Counties Rail. Co.*, 2 Rail. Cas. 736; 2 Q. B. 347; *Glover* v. *North Staffordshire Rail. Co.*, 20 L. J. Q. B. 376.

(*e*) 8 & 9 Vict. c. 20, s. 68.

and at all times maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, sufficient posts and rails, hedges, ditches, and mounds, or other fences (*f*), for separating the lands taken for the use of the railway from the adjoining lands not so taken, and for protecting such adjoining lands from trespass, and for preventing the cattle of the owners or occupiers thereof from straying thereout; and the company is to make and maintain also all necessary gates and stiles in such fences, etc.; and the gates are to be made to open towards such adjoining lands and not towards the railway, and with all necessary stiles,—subject, of course, always to this limitation, namely, that the company shall not be required to make any accommodation works in such a manner as will prevent or obstruct the working or use of the railway, and is not required to make any accommodation works with respect to which the owners and occupiers of the adjoining lands shall have agreed to receive compensation in lieu thereof (*g*).

By other sections of the Act, all disputes and differences as to the accommodation works required to be executed by the company are to be determined by two justices (*h*); and the justices are also thereby empowered to appoint the time for the commencement and execution of the works (*i*); moreover, if for fourteen days next after the time appointed by the justices for the commencement of the works, the company fail to commence such works,—or, having commenced them, fail to prosecute them diligently

(*f*) *R.* v. *Brown*, L. R. 2 Q. B. 630; *Bessant* v. *Great Western Rail. Co.*, 8 C. B. (N.S.) 368; *Buxton* v. *North Eastern Rail. Co.*, L. R. 3 Q. B. 549; *Dawson* v. *Midland Rail. Co.*, L. R. 8 Exch. 8; *Child* v. *Hearn*, L. R. 9 Exch. 176.

(*g*) **As to abandoned railways,** see 13 & 14 Vict, c. 83, s. 21.

(*h*) 8 & 9 Vict. c. 20, s. 69. See also *R.* v. *Waterford Rail. Co.*, 2 Ir. L. R. 580.

(*i*) *R.* v. *Fisher*, 3 B. & S. 191; *Skerratt* v. *North Staffordshire Rail. Co.*, 5 Rail. Cas. 178; *In re South Wales Rail. Co.*, 6 Rail. Cas. 197; *R.* v. *Brown*, L. R. 2 Q. B. 630; 1 Hodges on Railways, 7th ed., 368—370.

in a sufficient manner,—the parties aggrieved may themselves execute the works or repairs, and recover the expenses and charges of so doing from the company (*k*). Power is also given to the owners and occupiers of lands affected by the railway to make additional accommodation works, if they think those already constructed insufficient (*l*) ; but these additional works must, if the company requires it, be constructed under the superintendence of the company's engineer (*m*).

It is also provided by the Act that no accommodation works shall be constructed after the expiration of the period in that behalf appointed by the justices (*n*) ; or, if no express period has been so appointed, after five years from the completion of the railway, and the opening thereof for public use ; but the five years appointed by the Act are more directory than essential, thus, where, owing to a defect in the fence belonging to the defendant railway company which separated the railway from adjoining land in the occupation of the plaintiff, a colt of the plaintiff's had escaped through the fence on to the railway and was injured, and it appeared that the fence in question had been erected by the railway company for the purpose of preventing cattle from straying on their line, but had not been so erected within the five years next after the opening of the railway for public use,—the court held, that there was nothing in the Act which relieved the railway company from liability to make good the plaintiff's loss (*o*).

(*k*) 8 & 9 Vict. c. 20, s. 70.

(*l*) 8 & 9 Vict. c. 20, s. 71. See also *Colley* v. *London and North Western Rail. Co.*, 5 Exch. D. 277.

(*m*) 8 & 9 Vict. c. 20, s. 72. See also *Wilkinson* v. *Hull, etc., Rail. Co.*, 20 Ch. D. 323.

(*n*) 8 & 9 Vict. c. 20, s. 73. See also *Lockhart* v. *Irish North Western Rail. Co.*, 14 Ir. C. L. R. 384 ; *Darnley* v. *London, Chatham and Dover Rail. Co.*, L. R. 2 H. L. 43 ; 1 De G. J. & S. 204 ; 3 De G. J. & S. 24.

(*o*) *Dixon* v. *Great Western Rail. Co.*, [1896] 2 Q. B. 333. See also *Storer* v. *Great Western Rail. Co.*, 2 Y. & C. C. C. 48 ; *Wilson* v. *Furness Rail. Co.*, L. R. 9 Eq. 28.

And it is further provided that until the accommodation works are completed, the adjoining owners may when they have not agreed to receive compensation in lieu of the works being executed cross the railway with carriages, carts, and horses (*p*).

After the accommodation works have been completed,—and fences, with gates therein, have been erected along either side of the railway line, if any person omits to shut and fasten any such gate, as soon as he, and the carriage cattle or other animals under his care, have passed through the same, he is to forfeit for every such offence a sum not exceeding 40*s*.

The obligation to keep up fences which is imposed upon the railway company by the Act, exists only as between the company and the owners and occupiers of the *adjoining* lands; and no duty on the part of a railway company arises, under that section, towards its own passengers; that is to say, if an accident happens to a train in consequence of cattle straying on the line through the fences being out of repair, the passengers, if they are to succeed in an action for the injuries so received, must rely, not upon the above-mentioned section, but upon the common law duty imposed upon the company to take reasonable care that accidents do not happen in consequence of the line being imperfectly protected against cattle, where it is probable that they will stray upon it (*q*).

It has also been decided, that the liability of a railway company to make and maintain fences along their line is not more extensive than the liability of an ordinary landowner, in a case where such landowner is bound by prescription to repair fences for the benefit of his neighbour; that is to say, the liability of the railway company is a liability *only as between the company and the adjoining*

(*p*) 8 & 9 Vict. c. 20, s. 74. See also *Grand Junction Rail. Co.* v. *White*, 8 M. & W. 214; *Manning* v. *Eastern Counties Rail. Co.*, 12 M. & W. 237; 3 Rail. Cas. 637.

(*q*) 8 & 9 Vict. c. 20, s. 68. See also *Sharrod* v. *London and North Western Rail. Co.*, 4 Exch. 580; *Buxton* v. *North Eastern Rail. Co.*, L. R. 3 Q. B. 549.

owner; in other words, the Act only obliges the company to fence against cattle *which are lawfully using the adjoining land*(*r*): Thus, in one instance(*s*), it appeared that the plaintiff in 1846 became tenant from year to year of land belonging to one G., and in 1847 the defendants, a railway company, acquired part of the land in the exercise of their statutory powers, and by arrangement with G. paid him compensation in lieu of all accommodation works, including the right to have his land fenced from the railway, G. releasing the defendants from their statutory obligation in that respect. The defendants, however, made a fence of posts and rails between the land so occupied by the plaintiff and a ditch in the defendants' land adjoining the railway, and they planted a hedge on the side of the ditch nearest the railway, itself sufficient to prevent animals from straying thereon; but they afterwards neglected to keep up the posts and rails; and in consequence of their neglect to do so, in 1879 and whilst the plaintiff still continued in occupation under the original tenancy which had never been determined, a cow belonging to the plaintiff fell into the ditch and was killed. In these circumstances, the Court held, that the defendants were liable for the loss of the cow, because their arrangement with the *owner* did not exonerate them from their statutory liability to maintain the fence for the benefit of the *occupier*.

Again, where it appeared that a railway company let surplus land to the plaintiff, separating it, by means of an open post-and-rail fence four feet high, from the adjoining land not taken, and horses kept on the adjoining land of the defendant passed their heads through and over the fence, and did damage to the plaintiff's crops, it was held, that the duty of fencing being, by the statute, imposed upon the railway company, the defendant was not responsible for the trespass of his cattle, because the plaintiff

(*r*) *Ricketts* v. *E. & W. India Docks Rail. Co.*, 12 C. B. 160, 174.

(*s*) *Corry* v. *Great Western Rail. Co.*, 6 Q. B. D. 237; 7 Q. B. D. 322.

being entitled only through the company, the company's default was (in a sense) the plaintiff's default (*t*).

So, under circumstances showing that the plaintiff hired of the occupier of some land adjoining the defendants' line of railway a stable for his horse, and the horse was allowed during the day to graze on the land, but that one night it escaped from the stable on to the land, and thence through a defective fence on to the defendants' line, where it was run over and killed by a train, it was held, that the plaintiff was entitled to recover; *scilicet*, because he was within the intent of the provisions as to fences contained in the Act (*u*).

But where it appeared that the plaintiff, a platelayer in the employment of a railway company, was returning from his work along their line upon a trolly propelled by hand, when the pigs of the defendant which were lawfully on a field of the defendant which adjoined the railway line, got through the fence between that field and the railway, on to the railway line and in front of the trolly; and the trolly was in consequence upset, and the plaintiff injured, the Court held, that the plaintiff was not entitled to recover (*x*).

(*t*) *Wiseman* v. *Booker*, L. R. 3 C. P. D. 184.

(*u*) *Dawson* v. *Midland Rail. Co.*, L. R. 8 Exch. 8.

(*x*) *Child* v. *Hearn*, L. R. 9 Exch. 176, in which case it was observed by BRAMWELL, B., that the fence, to be made and maintained under s. 68 of the Railways Clauses Act, 1845, "is to be sufficient for two purposes, for separating the land taken for the use of the railway from the adjoining lands not taken, and for 'protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway.' The company were therefore bound to fence against the defendant's cattle, and I think the word 'cattle' in this section is sufficiently comprehensive to include pigs. Now, the fence was not sufficient to prevent the defendant's pigs from trespassing, and it would seem to follow that the railway company must be liable for the consequence of the pigs escaping through it. But it does not follow as a consequence that they would be liable for any mischief done by any pig escaping on to the line through a defective fence. Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a

Where the railway runs by the side of a highway, the highway is to be considered as adjoining land within the Act; and therefore the company must fence against cattle which are lawfully using the highway (*y*); and this is so, notwithstanding that (apart from statute) private individuals whose properties adjoin the highway are under no obligation to fence, unless against some special danger (*z*). An estray which is being driven home is lawfully on the highway; and if it meets with injury in consequence of the fences being dilapidated contrary to the statutory duty of the company to repair, the company will be responsible (*a*).

There is, however, no obligation upon the company, under this section, to fence one part of their property from another part; and it has been held that a company are not obliged to fence a station yard from the railway; and therefore are not responsible for an accident which happens to an animal which leaves the yard and goes upon the line of rails, without any fault on the part of the company's servants (*b*).

Again, where the facts were that the train overshot the platform, at a place where the line ran upon an

requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it." Now, here, the fence was not sufficient; and the company could not have maintained any action against the owner of the pigs for trespass, and the question arises, is the defendant liable to this plaintiff, an employee of the company? The servant can be in no better position than the master, when he is using the master's property for the master's purposes; and having met with the accident through the employer's negligence, the plaintiff can maintain no action against the defendant.

(*y*) *Manchester and Sheffield Rail Co.* v. *Wallis*, 14 C. B. 213.

(*z*) *Potter* v. *Parry*, 7 W. R. 182.

(*a*) *Midland Rail. Co.* v. *Daykin*, 17 C. B. 129.

(*b*) *Roberts* v. *Great Western Rail. Co.*, 4 C. B. (N.S.) 506, 520. See also *Siner* v. *Great Western Rail. Co.*, L. R. 4 Ex. 117; *Toomey* v. *London, Brighton and South Coast Rail. Co.*, 3 C. B. (N.S.) 146.

embankment, at the foot of which was the highroad, and that the night was dark, and there was no light, either in the carriage or on the platform, and no fence on the top of the embankment between it and the roadway beneath, and that the plaintiff, without waiting to see if the train would be put back to the platform, got out; and, in doing so, slipped and fell down the embankment on to the roadway beneath, it was held that the company being only bound to fence against the adjoining land were not obliged to fence for the benefit of persons already on the railway premises, and therefore could not (merely upon the ground of the want of a fence) be held responsible for the accident (*c*). On the other hand, where the company were possessed of a tramway, which ran by the side of their line, and which they invited the public to use on payment of a toll, the court held that the company were, by the common law,—and quite apart from the statute,—under a liability to protect persons lawfully using the tramway from injury from the passing trains, and were therefore bound to maintain sufficient fences and gates between the railway and the tramway (*d*).

B. Level crossings and the duty of railway companies in connection therewith. — If a railway crosses any turnpike road or other public road *on a level*, the company is required by the Railways Clauses Act, 1845, to erect and at all times thereafter to maintain, good and sufficient gates across the road, on each side of the railway, where the same shall communicate therewith; and the company must also employ proper persons to open and shut the gates, and the gates must be kept *constantly* closed across the road on both sides of the railway (*e*), except during the time when horses, cattle,

(*c*) *Harrold* v. *Great Western Rail. Co.*, 14 L. T. (N.S.) 440; *Walker* v. *Midland Rail. Co.*, 14 L. T. (N.S.) 796; *Holmes* v. *North Eastern Rail. Co.*, L. R. 4 Ex. 254.

(*d*) *Marfell* v. *South Western Rail. Co.*, 8 C. B. (N.S.) 525.

(*e*) 8 & 9 Vict. c. 20, s. 47.

carts, or carriages passing along the same require to cross the railway. The gates are to be of such dimensions, and so to be constructed, as that when closed they shall fence in the railway and prevent cattle or horses from getting from the road on to the railway ; and the gatekeeper must close the gates as soon as any animals or vehicles lawfully passing shall have passed across the line.

With respect to these statutory requirements, it has been stated (*f*) that persons have no right to open the gates for themselves for the purpose of passing through with carriages and horses, and therefore that if a person with a horse and cart, finding the gates shut and no watchman on duty, takes upon himself to open the gates and to cross the line, he does so at his own risk, and the company would not be responsible. Subject to that distinction, it appears, however, that the liability of the company, under the statute, extends to keeping the gates constantly closed against all cattle on the highway, *whether straying or passing thereon* (*g*).

Again where a carriage-way crossed the defendants' line on a level, and it appeared that there was a single gate, with a gate-keeper stationed at it, on one side of the line ; and that on the other side there were two gates, one of them leading into private property ; and the driver of a cart who desired to cross from the private property called out to the gate-keeper to know if a train was expected, and the gate-keeper signalled to him to come on, which he did,

The Board of Trade may order the gates to be closed across the railway instead of across the road, if they think that it would be more conducive to the public safety.

The local authority must repair an inclined plane leading up to a level crossing notwithstanding the railway company has raised the level of the highway under 8 & 9 Vict. c. 20, s. 16 (*West Lancashire District Council* v. *Lancashire and Yorkshire Rail. Co.*, 19 T. L. R. 625).

A lodge for the gatekeeper is provided by 26 & 27 Vict. c. 92, s. 6.

(*f*) *Wyatt* v. *Great Western Rail. Co.*, 6 B. & S. 709 ; 34 L. J. Q. B. 204.

(*g*) *Fawcett* v. *York and North Midland Rail. Co.*, 16 Q. B. 610 ; *Dickenson* v. *London and North Western Rail. Co.*, Har. & Rut. 399.

and the cart was run into by a train, the court held, that although the section in question in terms imposed the duty of merely keeping the gates closed across a public carriage road, yet that a general duty was implied of using proper caution in opening them; that as the vehicle could not be driven across the railway without passing through the gateway, it was the gate-keeper's duty to open the gate or else to refuse to open it, according as the line was clear or not; and that the defendants were liable for the accident, equally as if the gate-keeper had opened the gate (*h*). So where there were the proper gates, but they were negligently left open when a train was expected, the court held that the plaintiff was entitled to recover damages for the injury he met with, although, with care and circumspection on his part, he was able to have seen, at a distance, the approach of the train which occasioned the injury (*i*).

If the railway crosses any highway, other than a public carriage-way, on the level, then the company are required, at their own expense, to make and at all times maintain convenient ascents and descents, and other convenient approaches, with handrails or other fences; and also, if such highway is a bridleway, to erect and at all times maintain good and sufficient gates,—and if such highway is a footway, good and sufficient gates or stiles,—on each side of the railway where the highway communicates therewith (*k*), thus, where the line crossed a public footpath on the level, and the company had not erected any gate or stile, as provided by the Act, and the plaintiff, a child four-and-a-half years old (who had been sent on an errand), was found on the line with his foot cut off, the company were held liable (*l*).

(*h*) *Lunt* v. *London and North Western Rail. Co.*, L. R. 1 Q. B. 277.

(*i*) *Wanless* v. *North Eastern Rail. Co.*, L. R. 6 Q. B. 481; L. R. 7 H. L. 12.

(*k*) 8 & 9 Vict. c. 20, s. 61.

(*l*) *Williams* v. *Great Western Rail. Co.*, L. R. 9 Ex. 157.

It appears, however, that in respect of an accident which has happened in consequence of defects in the fences, gates, or stiles which the company are bound to make and maintain, the company, notwithstanding its duty at common law and under the statute (*m*), will not be liable if the person injured has *contributed* to the accident by want of ordinary and proper care on his own part; for the rule depends on whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence as that, but for such negligence on his part, the misfortune would not have happened; for in the former case the plaintiff would be entitled to recover; in the latter, not. Mere negligence would not, however, disentitle a plaintiff to recover, unless it were such that, but for that negligence, the misfortune could not have happened (*n*); accordingly with respect to the proof, the onus of proving affirmatively that there was contributory negligence on the part of the person injured, rests, in the first instance, on the defendants; and the plaintiff is not bound to prove the negative: but, in the course of the trial the onus may be shifted; and the contributory negligence may be proved in the course of the plaintiff's own evidence (*o*).

It is impossible to lay down any fixed rule as to what amounts to negligence on the part of the railway company, or contributory negligence on the part of the injured person; where, however, the facts showed that a good

(*m*) *Bilbee* v. *London and Brighton Rail. Co.*, 18 C. B. (N.S.) 584.

(*n*) *Tuff* v. *Warman*, 5 C. B. (N.S.) 571; 2 C. B. (N.S.) 740. See also *Siner* v. *Great Western Rail. Co.*, L. R. 3 Ex. 150; L. R. 4 Ex. 117; *Davey* v. *London and South Western Rail. Co.*, 11 Q. B. D. 213; 12 Q. B. D. 17; *Butterfield* v. *Forrester*, 11 East, 60; *Bridge* v. *Grand Junction Rail. Co.*, 3 M. & W. 246; *Davies* v. *Mann*, 10 M. & W. 548; *Dowell* v. *General Steam Navigation Co.*, 5 E. & B. 206; *Foy* v. *London and Brighton Rail. Co.*, 18 C. B. (N.S.) 225; *Richardson* v. *Metropolitan Rail. Co.*, L. R. 3 C. P. 374 n; *Ellis* v. *Great Western Rail. Co.*, L. R. 9 C. P. 551.

(*o*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41. See also *Dublin, etc. Rail. Co.* v. *Slattery*, 3 App. Cas. 1155.

and sufficient swing gate had been provided by the company at a place where a public footpath crossed the line, and it appeared that by way of extra precaution the company usually, but not invariably, fastened the gate by letting down a ring over the gate posts when a train was approaching, and a foot passenger, finding the ring up, taking it for granted that the line was clear, attempted to cross, and was knocked down and killed by a passing train, it was held that the omission to fasten the gate did not amount to an invitation to the deceased to come on the line, and that there was evidence of contributory negligence on his part disentitling his representatives to recover,—inasmuch as the deceased might, by looking up the line, have seen the approaching train in time to have avoided the accident (*p*).

But where a railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates, and a watchman was employed by the company to take charge of the gates and crossing during the day, but he was withdrawn at night, and the body of a man was found on the line near the level crossing, the man having been killed by a night train which carried the usual head lights but did not whistle or otherwise give warning of its approach, and in an action brought by the legal personal representatives of the deceased on the ground of negligence, the jury found a verdict for the plaintiff, although no evidence was given of the circumstances under which the deceased got on to the line, the court held that, even assuming negligence on the part of

(*p*) *Skelton* v. *London and North Western Rail. Co.*, L. R. 2 C. P. 631. See also *Ellis* v. *London and South Western Rail. Co.*, 2 H. & N. 424 ; *Haigh* v. *London and North Western Rail. Co.*, 1 F. & F. 646.

In *Stubley* v. *London and North Western Rail. Co.*, L. R. 1 Ex. 13 ; 4 H. & C. 83, it was stated that there is no general duty on railway companies to place watchmen at public footways crossing the railway line on the level ; and that it depends on the circumstances of each case, whether the omission to do so amounts to negligence on the part of the company. See *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41, 46.

the company, there was no evidence to connect such negligence with the accident, and that there was, therefore, no case to go to the jury, and the company were not liable (*q*).

Again, where it appeared that a line was crossed on the level by a public carriage-way and by a footway, and there were gates across the carriage-way, and turnstiles across the footway, but that there was no watchman on duty, and that the gate across the carriage-way had been left partially open on one side of the line,—the court held that these circumstances amounted to an intimation to foot passengers that the line was clear; and for this negligence on the part of the company they were, therefore, held liable to the representatives of a person who was killed while crossing the line (*r*).

So, in an action against a railway company for not properly fencing their line at a level crossing, by reason of which neglect of the company certain horses belonging to the plaintiff had strayed on to the line and been killed, it appeared that there were gates at the level crossing of the full width of the road properly so called, but that, for the convenience of foot passengers using the crossing, a swing gate had been placed by the company upon a piece of land beyond the limits of the road and on the same line with the gates; and that the horses after having strayed from the plaintiff's land arrived at the level crossing, where, finding the gates closed, they had turned aside to the swing gate and had forced their way through it,—*owing to the defective condition of the posts*,—and so had got on to the line, when they were killed by a passing train,—the court held that there was evidence of a breach on the part of the company of their duty to fence the railway from the road, and that they were, therefore, liable (*s*).

(*q*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41.

(*r*) *Stapley* v. *London and Brighton Rail. Co.*, L. R. 1 Ex. 21; 35 L. J. Ex. 7, following *Bilbee* v. *London and Brighton Rail. Co.*, 18 C. B. (N.S.) 584.

(*s*) *Charman* v. *South Eastern Rail. Co.*, 21 Q. B. D. 524.

Again, where some beasts of the plaintiff were being driven at 11 p.m. along an occupation road to some fields, and the road crossed a siding of the defendants' railway on the level; and while the cattle were crossing the siding, the company's servants negligently sent some trucks down an incline into the siding, and thereby separated the cattle from the drover and frightened them and they rushed away, and six of them were afterwards found at between 3 and 4 a.m. lying dead or dying on another part of the line; and it appeared that these six beasts had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level crossing and had got into the garden there through a defect in the fences, and so on to the line,—the court held, that the company had been guilty of negligence whereby the drover had lost control over the cattle, and that it was, therefore, no answer to the action of the plaintiff for the injury to his cattle, for the company to say, that if the fence of the garden had not been defective the accident would not have happened; and for the same reason the damages claimed were not too remote (*t*).

As regards bridges erected for carrying any road over the railway, it is required, by statute, that such bridges shall be built with a fence (on each side thereof) of not less than four feet, and with a fence (on each side of the immediate approaches to the bridge) of not less than three feet (*u*); also, the railway company is bound to keep the road and the bridge in repair (*x*), unless the railway is carried over the road by means of a bridge (*y*).

Where notices have been put up by the railway company forbidding people to cross the line at a particular point,—if these notices have been continually disregarded

(*t*) *Sneesby* v. *Lancashire and Yorkshire Rail. Co.*, 1 Q. B. D. 42.

(*u*) 8 & 9 Vict. c. 20, s. 50.

(*x*) *Leech* v. *North Staffordshire Rail. Co.*, 29 L. J. M. C. 151.

(*y*) *London and South Western Rail. Co.* v. *Skerton* (*Surveyor*), 23 L. J. M. C. 158; and see *Dover* (*Corporation*) v. *London, Chatham and Dover Rail. Co.*, 30 L. J. Ch. 474.

by the public, and the company's servants have not interfered to enforce their observance,—and an accident occurs to a person crossing the line at the point in question, the railway company cannot set up the existence of the notices by way of defence to the action for the injury (*z*).

A private railway, on private property, made and used exclusively for the proprietor's own purposes, and not for passenger traffic, is not subject to these statutory regulations as to gates and persons in charge thereof at level crossings ; nor are the proprietors bound even at common law to erect such gates. And therefore, where a horse escaping by night from a field, by no fault of its owner, strayed along a turnpike-road on to a private branch railway at a level crossing where there were no gates or person in charge, and then proceeded down the private branch railway to where it formed a junction with the main line, and was killed on the main line by a passing train,—the court held, that the proprietors of the private branch-line were not liable for the accident (*a*).

(*z*) *Dublin, &c., Rail. Co.* v. *Slattery*, 3 App. Cas. 1155.
(*a*) *Matson* v. *Baird*, 3 App. Cas. 1082.

CHAPTER V.

A. Duty of mine-owners and mining lessees to fence pits, shafts, quarries, &c.—IN GENERAL.—At common law,—apart from any special agreement,—the mine-owner or mining lessee, who lawfully opens a pit or shaft in the surface, is liable to the owner or tenant of the surface lands for any injury, to their beasts lying upon or depasturing upon such lands, that occurs through the pit or shaft not being properly fenced, for it is the duty of one who, by opening a shaft, makes an alteration in the normal state of things to take all proper steps to fence it in, so as to prevent injury happening to him who has a right to the use of the surface of the soil: Thus, where a person had lawfully turned some horses into a field in which there was a shaft improperly fenced, and one of the horses fell in and was killed, the party who had under license from the owner of the surface sunk the shaft was held liable for the damage (*a*).

(*a*) *Groucott* v. *Williams*, 4 B. & S. 149; 32 L. J. Q. B. 237, in which case it was said by COCKBURN, C.J., that the question before the court was nice and novel, being "whether, when the

So, where one person had the exclusive right to dig stone in a certain close, and another had the exclusive right of pasture therein, the cattle of the latter got into the stone quarry and damaged the stone ; and the question was, whether the former might distrain the cattle damage feasant, it was held that he could not, for the pasture owner was not obliged to fence off his pasture from the quarry, the duty of protecting which clearly devolved upon the person having the right to dig there, who therefore was liable for all injury occurring to cattle lawfully depasturing where the injury arose in consequence of the neglect of such duty (*b*).

It is the duty also of every man who opens a pit or

minerals below the surface of the ground have been separated from the ownership and occupation of the surface, with a licence to the person to whom the minerals are let to sink a shaft through the surface, it is incumbent upon the last mentioned person to fence off the shaft so as to protect the owner of the surface from injury, or whether such owner must himself take steps for securing himself from injury." There being no stipulation between the parties, "and no evidence of any mining custom, we have to see whether there is any *implied* contract that the fencing should be done by the owner of the minerals. On the one hand the owner may say to the occupier,—I have given you liberty to sink a shaft through the surface of my land, but it is incumbent upon you to sink it in such a manner that no injurious consequences may result beyond the loss of soil which must occur by reason of your so sinking the shaft. On the other hand, the person sinking the shaft may say,—I have done no more than you gave me a right to do ; and though my leaving the shaft open may be attended with some danger to your horses and cattle, if you find that there is any danger, you must protect yourself against it by making a fence yourself." Now, could the mining lessee (or the mine-owner) make such an answer as that to the demand of the surface-owner ; or is there an implied contract on the part of the mining lessee (or mine-owner) to take care that the shaft is fenced off ? I think that it is more reasonable, that he who does any work that is the cause of danger should avert that danger by doing all that is reasonably necessary ; and I think that the person who sinks the shaft should do what is necessary to render it harmless to the horses and cattle which are likely to feed on the surface of the ground ; and an implied obligation arises to that extent. See also *Sybray* v. *White*, 1 M. & W. 435.

(*b*) *Churchill* v. *Evans*, 1 Taunt. 529.

quarry on his own land, so to fence and guard the excavation as to prevent injury to persons lawfully (*c*) passing along a highway or public way upon which such land abuts or to which it is near (*d*): Thus a person who in building a house upon land abutting upon a public footway, excavates an area, which by the negligence of his workpeople is left unfenced, is liable for injury suffered by one who, lawfully using the way after dark, falls into the area, without any default of his own, and, if the person so falling be killed, is moreover liable under Lord Campbell's Act, to the representatives of the deceased, for this injury (*e*). So, in the case of a private road which the public have been invited to use for any particular purpose, it is the duty of the owner, should he make excavations, etc., thereon, to fence and guard such excavations to prevent injury to persons passing lawfully along it (*f*), the obligation to fence being of course still stronger where a toll is exacted for the use of the road (*g*).

(*c*) Where persons are trespassing on the land of one who has opened an excavation adjoining a highway or public way, or, in other words, are not *lawfully* upon such land, the landowner is probably not liable for injuries resulting to such persons from the excavation provided the excavation was made prior to the passing of the Highway Act, 5 & 6 Will. 4, c. 50, s. 70, notwithstanding that the excavation be within twenty-five yards of the way (*Hardcastle* v. *South Yorkshire Rail. Co.*, 4 H. & N. 67). As to the effect of the Act with respect to the propriety of a defence to an action to recover compensation for injuries received through an excavation, see *infra*, pp. 96, 97.

(*d*) *Hadley* v. *Trylor*, L. R. 1 C. P. 53. See also *Coupland* v. *Hardingham*, 3 Camp. 397; *Stone* v. *Jackson*, 16 C. B. 199; *Hill* v. *New River Co.*, 9 B. & S. 303; *Daniells* v. *Potter*, 4 C. & P. 262; *Proctor* v. *Harris*, 4 C. & P. 337; *Hughes* v. *Macfie*, 2 H. & C. 744.

(*e*) *Barnes* v. *Ward*, 9 C. B. 392.

(*f*) *Corby* v. *Hill*, 4 C. B. (N.S.) 556; *Chapman* v. *Rothwell*, E. B. & E. 168.

(*g*) *Shoebottom* v. *Egerton*, 18 L. T. (N.S.) 364, 889, in which case it appeared that the defendants were possessed of a navigable canal, and that the person injured had duly paid toll to the

Again, where it appeared that a public highway crossed the defendant's canal over a swivel bridge which had been erected by and was under the control of the defendants, and that when the bridge was opened to allow boats to pass, the part of the highway which abutted on the canal was left wholly unfenced, in consequence of which and of the insufficient lighting of the place, a person who was passing along the highway at night fell into the canal and was drowned, it was held that the canal company, as owners of the canal, or otherwise as being entitled to the tolls levied for the use of the canal, were liable (*h*).

The landowner, moreover, is not relieved from his liability for an accident that has occurred in consequence of an excavation on his land being made too close to a public highway, by the mere fact that the obligation of fencing the highway is, by statute, imposed on certain other parties who have neglected their duty in this respect: Thus, where a Board of Works was required by a private Act to build and fence when made such part of a highway as was within its district, and the fencing was not done upon the road, which was made upon an embankment that sloped to ground on a lower level upon either side, and it appeared that in digging out the foundations of a house intended by an adjoining landowner to be built on one side of the road, the landowner excavated a hole which cut into the slope of the embankment, and into the hole a person fell while walking along the highway in the dark, and suffered damage, the landowner was held liable (*i*).

These rules, however, apply only to the case of an excavation *newly* made by the side of an existing highway, for a

defendants for the use thereof, moored his boat at one of the mooring places on the banks of the canal, gone into a near-by town over a bridge, and, on returning to his boat over the bridge, fallen through a hole in its floor into the canal basin.

(*h*) *Manley* v. *St. Helen's Canal Co.*, 2 H. & N. 840.

(*i*) *Wettor* v. *Dunk*, 4 F. & F. 298.

landowner is not bound to fence in an old excavation which has been on his land adjoining the highway from time immemorial, thus, where there was a highway by the side of which from time immemorial a tidal ditch ran, not constructed by the owners of the land on which it ran, but used by them, and it appeared that a person while driving a cab along the highway drove into the ditch for want of it being properly fenced and protected and was thrown over into it and sustained serious damage, it was held that there was no obligation on the landowners to fence the ditch (*k*). So, the rule has no application where the highway is newly dedicated to the public, and happens to run close to an already existing ditch or sewer; for, in such case, the public who take the benefit of the new highway take it subject to all the then existing risks and inconveniences; and if any fences are necessary as a protection against these, the fences must be erected at the public expense (*l*).

Where, however, a person has dangerous premises, and enters into a contract with another person to do some work or perform some operation thereon (*m*), he is bound either to fence or otherwise strengthen the dangerous parts, or else to give such reasonable notice to the workmen employed as will reasonably guarantee their safety (*n*); and although persons who are using premises by the bare permission of the owner, must in general take the premises as they find them, and cannot require

(*k*) *Cornwell* v. *Metropolitan Commissioners of Sewers*, 10 Exch. 771. See also *Wilson* v. *Halifax Corporation*, L. R. 3 Exch. 114.

(*l*) *Fisher* v. *Prowse*, 2 B. & S. 771; 31 L. J. Q. B. 212, citing *Cornwell* v. *Metropolitan Commissioners of Sewers*, 10 Exch. 771; *Robins* v. *Jones*, 15 C. B. (N.S.) 221.

(*m*) *Indermaur* v. *Dames*, L. R. 2 C. P. 311; L. R. 1 C. P. 274.

(*n*) *Holmes* v. *North Eastern Rail. Co.*, L. R. 4 Ex. 254; *Marfell* v. *South Wales Rail. Co.*, 8 C. B. (N.S.) 525.

the holes and cellars therein to be protected (*o*), yet even in such case, the owner has no right to create any new cause of danger on the property without apprising the party thereof; and if he does so and an accident happens in consequence, he will be liable (*p*): Thus, where the defendant as contractor for a railway company and in the course of building a new line for the company, diverted a public footpath, and substituted a new footpath for part of the old path, he was held liable for not fencing or otherwise protecting the point of diversion,—by reason of which neglect on his part, the plaintiff passing along the footpath on a dark night continued along the old part of the path, instead of striking into the new path substituted therefor, and so was injured by falling over the embankment of the new line (*q*); so where it appeared, that it was the usual practice at the defendant company's station to unload coal wagons by shunting them and tipping the coal into cells, and that it was also the usual practice for the consignees of the coal, or their servants, to assist in the unloading, and for that purpose to go along a flagged path by the side of the wagons, and the plaintiff, who was the consignee of a coal wagon which could not be unloaded in the usual way owing to all the cells being occupied, went, with the permission of the stationmaster, to his wagon, which was shunted in the usual place, and taking some coal from the top of the wagon, descended on to the flagged path, when the flag he stepped on gave way, and he fell into one of the cells and was injured, it was held, that the plaintiff, although he was not getting his coal in the usual mode, was yet not a mere licensee, but was

(*o*) *Bolch* v. *Smith*, 7 H. & N. 736; *Binks* v. *South Yorkshire Rail. Co.*, 32 L. J. Q. B. 26; *Hounsell* v. *Smyth*, 7 C. B. (N.S.) 731; *Gautret* v. *Egerton*, L. R. 2 C. P. 371; *Ivay* v. *Hedges*, 9 Q. B. D. 80.

(*p*) *Gallagher* v. *Humphrey*, 10 W. R. 664; *Wilkinson* v. *Fairrie*, 1 H. & C. 633.

(*q*) *Hurst* v. *Taylor*, 14 Q. B. D. 918.

engaged, with the consent and at the invitation of the defendants, in a transaction of common interest to both parties, and was therefore entitled to require that the defendants' premises should be in a reasonably secure condition (*r*).

A person who wilfully strays from a public footpath or highway, on to the adjoining property, and who falls into an unfenced pit or quarry there, is a mere trespasser, and can, in general, maintain no action for the injury so received: Thus, where one seised of a waste adjacent to a highway, dug a hole in the waste within thirty-six feet of the highway, and the mare of another, escaping into the waste, fell into the hole, and was killed, it was held that no action lay against the waste owner, because making the pit in the waste was no wrong to the owner of the mare through whose own fault the mare escaped into the waste (*s*); so, where an action brought under Lord Campbell's Act to recover compensation for an accident that had occurred to a person who had strayed off the highway and fallen into an open excavation made by the defendants while constructing a reservoir, it was held that the defendants were not liable, because the excavation was made at some distance from the way, and the person falling into it was a trespasser upon the defendants' land before he reached it (*t*).

(*r*) *Holmes* v. *North Eastern Rail. Co.*, L. R. 4 Exch. 154; L. R. 6 Exch. 123.

(*s*) *Blyth* v. *Topham*, Cro. Jac. 158. See also *Hounsell* v. *Smyth*, 7 C. B. (N.S.) 731.

(*t*) *Hardcastle* v. *South Yorkshire Rail. Co.*, 4 H. & N. 67, in which case it was said by POLLOCK, C.B., that "when a man dedicates a way to the public, there does not seem any just ground, in reason and good sense, that he should restrict himself, in the use of his land adjoining, to any extent further than that he should not make the use of the way dangerous to the persons who are lawfully upon it and using it,—for to do so would be derogating from his grant; but he gives no liberty or licence to the persons using the way to trespass upon his adjoining land: and if they, in so doing, come to misfortune, we think they must bear the misfortune, and that the owner of the land is not responsible. If fences are to be put up, it would seem more reasonable that they should be put up by those who use the way,—or by those

The obligation of fencing pits and quarries, and of preventing them from becoming a nuisance to the public, is *primâ facie* on the occupier of the premises in which the excavations are made, and not upon the landlord (*u*); but if it be shown that damage has resulted from the nonfeasance or misfeasance of the landlord, the party injured may, at his option, sue either him or the tenant (*x*). And the landlord will also be liable if he lets premises in an unsafe and dangerous condition (*y*); or if, having taken upon himself the burden of repairing the fences, he has allowed them to become dilapidated (*z*).

UNDER STATUTE.—With regard to all coal mines, and mines of stratified iron-stone, mines of slate, and mines of fire-clay,—it is provided, by the Coal Mines Regulation Act, 1887 (*a*), that certain rules, general and special, respecting the fencing of parts of the mine and of the machinery therein, shall be observed so far as reasonably practicable (*b*): and by such rules, it is provided that every entrance to any place not in actual course of working and extension shall be properly fenced across the whole width of such entrance so as to prevent persons inadvertently entering the same (*c*); and that the top of every

who are under the obligation to repair the way,—than by the person or his successors who dedicated the way to the public" (approving *Blyth* v. *Topham*, Cro. Jac. 158).

(*u*) *Jarvis* v. *Dean*, 11 Moore, 354; *Hadley* v. *Taylor*, L. R. 1 C. P. 53.

(*x*) *Todd* v. *Flight*, 9 C. B. (N.S.) 377, 389; *Rosewell* v. *Prior*, 2 Salk. 460; *Coupland* v. *Hardingham*, 3 Camp. 398; *Bishop* v. *Bedford Charity*, 1 E. & E. 697, 714.

(*y*) *Picard* v. *Smith*, 10 C. B. (N.S.) 470; *Rich* v. *Basterfield*, 4 C. B. 805; *R.* v. *Pedly*, 1 A. & E. 822; 3 N. & M. 627; *Gandy* v. *Jubber*, 5 B. & S. 78, 485.

(*z*) *Payne* v. *Rogers*, 2 H. Bl. 350.

(*a*) 50 & 51 Vict. c. 58. This statute, itself amended by 59 & 60 Vict. c. 43, repealed, but in substance re-enacted the provisions of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76).

(*b*) 50 & 51 Vict. c. 58, ss. 49, 50. These sections repeat the provisions contained in s. 51 of the earlier Act (*Baker* v. *Carter*, 3 Exch. D. 132; *Wynne* v. *Forrester*, 5 C. P. D. 361).

(*c*) Rule 6.

shaft which for the time being is out of use, or used only as an air-shaft, shall be securely fenced (*d*) ; and that the top and all entrances between the top and bottom, including the sump (if any), of every working ventilating or pumping shaft shall be properly fenced,—but not so as to prevent the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used (*e*) ; and that every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be and be kept securely fenced (*f*). Moreover, where a mine is either abandoned or ceases to be worked, it is provided (*g*) that the owner of the mine and every other person interested therein, shall cause the top of the shaft and any side entrance from the surface to be securely fenced, and so to keep them for the prevention of accidents, non-compliance therewith being an offence against the Act, and further, any such shaft or side entrance left unfenced, if within fifty yards of any highway, road, footpath, or place of public resort, or if in open or uninclosed ground, is made a nuisance within the meaning of s. 91 of the Public Health Act, 1875.

With regard to all mines other than those to which the Coal Mines Regulation Act applies, it is provided by the Metalliferous Mines Regulation Act, 1872 (*h*), that certain rules, general and special, shall be observed in every such mine (*i*) ; and, accordingly, the top of every shaft which was opened before the commencement of the actual working for the time being of the mine, and has not been used during such actual working, must, *if so required in writing by the inspector of the district*, be securely fenced (*k*) ; so, the top of every other shaft

(*d*) Rule 18.

(*e*) Rule 19.

(*f*) Rule 31.

(*g*) 50 & 51 Vict. c. 58, s. 37. This section corresponds with s. 41 of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76).

(*h*) 35 & 36 Vict. c. 77. See also 38 & 39 Vict. c. 39.

(*i*) 35 & 36 Vict. c. 77, s. 23.

(*k*) Rule 6.

which for the time being is out of use, or used only as an air-shaft, must be securely fenced (*l*); and the top and all entrances between the top and bottom of every working or pumping shaft (*m*) shall be properly fenced,—but not so as to prevent the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used (*n*). Moreover, various penalties are imposed upon persons offending against the provisions of the Act (*o*), which are, by the Quarries Act, 1894 (*p*), extended, with some modifications, to quarries for getting slate, stone, coprolites, etc., whenever the depth in any part of the quarry exceeds twenty feet.

With respect to the sinking of pits or shafts by the owner of land in proximity to carriage-ways or cart-ways, it was provided by the Highway Act (*q*) that no person should thereafter sink any pit or shaft, or erect any steam-engine or other like machine, within the distance of twenty-five yards, or any windmill within the distance of fifty yards, from any part of any carriage-way or cart-way, unless such pit, shaft, steam-engine, or windmill be within some house or other building or behind some wall or fence, sufficient to conceal or screen the same from the carriage-way or cart-way, so that the same may not be dangerous to passengers, horses, or cattle; but erections of the specified character in existence at the time of the passing of the Act may be still used, and also be repaired and rebuilt or even enlarged. And it is further provided that the surveyors of highways are to fence holes dug by them for the purpose of getting materials for the repair of the highways (*r*). As a consequence of these provisions in the Highway Act, it is probably now no defence to an

(*l*) *Evans* v. *Mostyn*, 2 C. P. D. 547.
(*m*) *Foster* v. *North Hendre Mining Co.*, [1891] 1 Q. B. 71.
(*n*) Rule 7.
(*o*) 35 & 36 Vict. c. 77, ss. 31—38.
(*p*) 57 & 58 Vict. c. 42.
(*q*) 5 & 6 Will. 4, c. 50, s. 70.
(*r*) 5 & 6 Will. 4, c. 50, s. 55; *Morgan* v. *Leach*, 10 M. & W. 558.

action brought to recover compensation for injury received through a pit or shaft, not in existence at the time of the passing of the Act, being improperly fenced, to allege that the plaintiff was a trespasser, if the pit or shaft was within the distance of twenty-five yards from the carriage-way or cart-way.

All dangerous machinery is, by various modern statutes, required to be securely fenced,—for the protection of the employees and others (*s*).

B. Duty of mine-owners and mining lessees to leave barriers between their own mines and the mines adjoining.—IN GENERAL.—By the general law of the country, no duty is thrown upon the owner of a coal or iron mine to leave a barrier between his own property and that of his neighbour, and there does not appear to be any custom, as to leaving barriers, in any of the coal or iron-stone districts; accordingly, it is the practice for each mine-owner to work full up to the boundary of his own strata on the dip, and to leave a barrier on the rise (*t*),—such barrier being manifestly left for the mine-owner's own protection.

Every man is, in fact, entitled at common law, to excavate up to the very edge of his own property, subject only to not disturbing the right of lateral support, to which his neighbour's land, while unencumbered by buildings, is entitled (*u*); and this right apparently is the reason why every mine-owner may, at common law, work up to the extreme limits of his property, even although in so doing he may cut away the only barrier which exists between his own mine and the one adjoining (*x*); and, in such case, there is no obligation, by

(*s*) 54 & 55 Vict. c. 75; 58 & 59 Vict. c. 37; *Redgrave* v. *Lloyd*, [1895] 1 Q. B. 876.

(*t*) *Clegg* v. *Dearden*, 12 Q. B. 600.

(*u*) *Angus* v. *Dalton*, 3 Q. B. D. 85; 4 Q. B. D. 162; 6 App. Cas. 740.

(*x*) *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. See also *Williams* v. *Bagnall*, 15 W. R. 272.

the common law, even to give notice to the adjoining proprietor, or mine-owner, of the intended cutting away or excavation (*y*).

Where two mines lie contiguously, one being worked at a higher level than the other, the proprietor of the lower mine is under a natural servitude to the proprietor of the upper mine to receive all water which finds its way down into the lower mine by *natural gravitation:* Thus, where it appeared that the plaintiff was possessed of a colliery, and that the defendant was possessed of the colliery adjoining, which was upon a higher level than the plaintiff's colliery, and that, at the time the defendant became possessed of his colliery, there were three large holes, called thyrlings, existing in the barrier between the two mines,—this barrier being wholly within the plaintiff's colliery, and the thyrlings having been made by a previous owner of the defendant's colliery, between whom and the defendant there was no privity, either of contract or of estate,—and it also appeared that in the course of winning the coal from his colliery, the defendant broke open a natural subterranean reservoir of water, the existence of which was well known to him, and the water flowed down to the thyrlings before mentioned, and through them into the plaintiff's colliery, where it did considerable damage, it was held that the defendant was not liable, for the reason that it was the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence might be, that some damage would accrue to the owner of the adjoining mine, so long as such damage did not arise from the negligent or malicious conduct of the party (*z*).

(*y*) *Trower* v. *Chadwick*, 6 Bing. N. C. 1 ; 8 Scott, 1 ; *Mundy* v. *Duke of Rutland*, 23 Ch. D. 81.

(*z*) *Smith* v. *Kenrick*, 7 C. B. 515, in which case it was observed by CRESSWELL, J., who delivered the judgment of the court, that "Here the working of the two mines has been simultaneous ; but the defendant's mine not being subject to any servitude, what

The proprietor, however, of the lower mine is not obliged to receive water which has been brought into the upper mine by *artificial* means; and therefore, if the owner of the upper mine diverts a stream, *e.g.*, so as to bring it on his own land,—or, by any other means, brings foreign water on his own land,—he must get rid of this water in some other way than by sending it down, or leaving it to find its own way down, into the workings in the adjoining mine (*a*),—unless, of course, he is able to show a prescriptive or other right or title authorising him to send such water down or leave it to find its way down (*b*): Thus, where the plaintiff was the lessee of certain mines, and the defendant, who was the owner of a mill, the site and surface of which adjoined the surface lands under which the mines were worked, desiring to construct a reservoir on his own surface lands, employed a competent engineer and a contractor for that purpose, and these persons neglected, or at all events took no care to block up certain vertical shafts that connected certain old passages of disused mines, at a spot up to which the plaintiff had worked his mines, with the surface lands above, such shafts (which had been long out of use) being filled up with marl and earth, and it appeared that, in consequence of the not blocking up the shafts, one of

authority is there for saying that the plaintiff, by working his coal, can alter or abridge the defendant's right to work his also? Surely the reasonable thing is, that the plaintiff shall leave part of his own coal, to protect his own workings against the influx of water; and, in fact, the plaintiff appears to have taken that view; for he left a barrier, which would have been sufficient for the purpose, had it not been broken through by a wrong-doer; but the defendant is not responsible for that wrongful act" (citing *R.* v. *Commissioners of Sewers for Pagham Level*, 8 B. & C. 774; Dig. lib. 39, tit. 3).

(*a*) *Baird* v. *Williamson*, 15 C. B. (N.S.) 376; 33 L. J. C. P. 101; *Bagnall* v. *London and North Western Rail. Co.*, 7 H. & N. 423; 1 H. & C. 544; *West Cumberland Iron and Steel Co.* v. *Kenyon*, 6 Ch. D. 773; 11 Ch. D. 782; *Lomax* v. *Stott*, 39 L. J. Ch. 834; *Fletcher* v. *Smith*, 2 App. Cas. 781; *Snow* v. *Whitehead*, 27 Ch. D. 588.

(*b*) *Chadwick* v. *Marsden*, L. R. 2 Ex. 285; *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602; *Mundy* v. *Rutland*, 23 Ch. D. 81.

them burst, when the reservoir was filled and the water flowed down through the old passages and flooded the plaintiff's mine ; the court held, that the defendant was liable for the injury so done ; for that, having brought on to his land something liable to do damage if it escaped, he was bound to keep it within bounds *at his peril*, since the plaintiff had a right to be free from water *artificially* brought or sent to him, directly or indirectly, by its being sent to where it would necessarily flow to him ; and the defendant had no right to pour or send water on to the plaintiff's works (*c*).

It seems to follow that, where a mining lessee or a mine-owner has even wrongfully perforated the barrier between his own mine on the dip and the mine of the adjoining mine-owner on the rise, the latter has no right to make a convenience of the openings for the purpose of conducting water from his mine by artificial means, and so as to cause more of it to flow down to his neighbour's mine, than would find its way there by natural gravitation (*d*).

Moreover, a mine-owner or mining lessee, not being responsible for an injury caused by the natural percolation of water from his mine, or by the natural descent of water, that is not foreign water, from his mine, into the adjoining mine, is not responsible if the workings in his own mine stop the percolation of the water from his own into the neighbouring soil, or cause the drying up of wells, etc., on the neighbouring property (*e*).

It appears to be uncertain, whether one mine-owner can, by prescription, acquire a right, in the nature of an easement, to compel the adjoining mine-owner to maintain a barrier or boundary wall between the two mines, but

(*c*) *Rylands* v. *Fletcher*, L. R. 3 H. L. 330 (affirming L. R. 1 Ex. 265 and reversing 3 H. & C. 774).

(*d*) *Westminster Brymbo Coal Co.* v. *Clayton*, 36 L. J. Ch. 476.

(*e*) *Acton* v. *Blundell*, 12 M. & W. 324 ; *Chasemore* v. *Richards*, 7 H. L. 349 ; 2 H. & N. 168 ; *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248 ; *Elliott* v. *North Eastern Rail. Co.*, 1 J. & H. 145 ; 10 H. L. 333.

apparently the right may arise by *express* grant; also, where the plaintiff's and the defendant's titles have had a common origin, it may, *semble*, arise by *implied* grant (*f*).

REMEDIES AVAILABLE TO MINE-OWNERS IN RESPECT OF BARRIERS.—A mine-owner may be enjoined from working his mine in such a way as to cause *irreparable* damage by foreign water to the adjoining mine (*g*).

Again, a mine-owner who breaks through a barrier on his neighbour's land whereby water escapes on to his neighbour's land, is liable as for a trespass, and for the consequential damage arising therefrom is liable in case for not preventing the water from continuing to flow from his own mine into that of his neighbour (*h*). But, in the general case, the consequential damage must be preventible (*i*); and a mine-owner, who has wrongfully worked into the mine of his neighbour, and so let water escape, must erect on his own land any barrier or wall that may be necessary to prevent the further damage, for he has no right to commit a fresh trespass in order to stop the continued flow of water (*k*).

The action, whether of trespass or of case, must be brought within six years from the time when the cause of action accrues, and not after (*l*), the cause of action accruing, in general, when the actual damage first occurs, without reference to the time of committing the act which caused it (*scilicet*, being a lawful act, done upon a man's

(*f*) *Dunn* v. *Birmingham Canal*, L. R. 7 Q. B. 244; L. R. 8 Q. B. 42.

(*g*) *Duke of Beaufort* v. *Morris*, 6 Hare, 340; 2 Ph. 683; *Earl of Mexborough* v. *Bower*, 7 Beav. 127; *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515; *Mundy* v. *Duke of Rutland*, 23 Ch. D. 81; *Westminster Brymbo Coal Co.* v. *Clayton*, 36 L. J. Ch. 476.

(*h*) *Firmstone* v. *Wheeley*, 2 D. & L. 203; *Wilson* v. *Waddell*, 2 App. Cas. 95.

(*i*) *Nichols* v. *Marsland*, L. R. 10 Ex. 255; 2 Ex. Div. 1; *Box* v. *Jubb*, 4 Ex. Div. 76; *Dixon* v. *Metropolitan Board of Works*, 7 Q. B. D. 418.

(*k*) *Clegg* v. *Dearden*, 12 Q. B. 600; *Smith* v. *Kenrick*, 7 C. B. 561; *Taylor* v. *Stendall*, 7 Q. B. 634.

(*l*) 21 Jac. 1, c. 16, s. 3.

own land), and the statute begins to run from the time of such actual damage (*m*).

And by statutory provision (*n*) the computation must be made without reference to the period when the damage is first discovered ; that is to say, no extension of the time prescribed by the statute is allowed (or used to be allowed) *at law* on the ground of fraud or mistake : thus it was held no answer to a plea of the Statute of Limitations, that the plaintiff was prevented by the fraud of the defendant from knowing of the cause of action until after the period of limitation had expired (*o*).

On the other hand, it was a well-settled rule *in equity*, that, in a case of fraud or mistake, the Statute of Limitations was no bar to relief in cases falling within the exclusive jurisdiction of the courts of equity (*p*) ; for the statute, it was said, did not bind the courts of equity, and although these courts adopted the statute, as a rule, to guide their discretion, yet, in cases of fraud and of mistake, they held that the statute ran only from the discovery of the fraud or mistake (*q*). And now, under the provisions of the Judicature Act, 1873 (*r*), which came into force on November 2nd, 1875, the rule of equity in all these respects is become the rule also at law (*s*).

(*m*) *Bonomi* v. *Backhouse*, El. B. & E. 622 ; 9 H. L. Cas. 503 ; *Roberts* v. *Read*, 16 East, 217 ; *Gillon* v. *Boddington*, 1 Ry. & M. 161 ; *Smith* v. *Thackerah*, L. R. 1 C. P. 564.

(*n*) 21 Jac. 1, c. 16, s. 3.

(*o*) *Imperial Gas and Coke Co.* v. *London Gas Light Co.*, 10 Exch. 39, in which case it was observed by MARTIN, B., *arguendo*, "It constantly happens that the owner of a coal mine takes coal from an adjoining mine, and by fraud prevents it being found out for more than six years, *yet that is no answer to the Statute of Limitations.*" See *Blair* v. *Bromley*, 5 Hare, 542 ; 2 Ph. 354 ; *Hunter* v. *Gibbons*, 1 H. & N. 459.

(*p*) *Smith* v. *Fox*, 6 Hare, 386 ; *Chetham* v. *Hoare*, L. R. 9 Eq. 571 ; *Vane* v. *Vane*, L. R. 8 Ch. App. 383.

(*q*) *Ecclesiastical Commissioners* v. *North Eastern Rail. Co.*, 4 Ch. D. 845.

(*r*) 36 & 37 Vict. c. 66.

(*s*) *Gibbs* v. *Guild*, 8 Q. B. D. 296 ; 9 Q. B. D. 59 ; *Fullwood* v. *Fullwood*, 9 Ch. D. 176.

It is also a well-settled rule of law, applicable in all the courts, that a man is not to be sued twice over upon the same cause of action, *i.e.*, for the same wrong; in other words, all damages resulting from one and the same cause of action must be recovered at one and the same time (*t*), and it appears to have been decided that a mine-owner who has as the result of one action received compensation for the abstraction of his boundary coal, cannot afterwards bring another action for the subsequent consequential damage caused by the water flowing down into his mine through the broken barrier (*u*).

With respect, however, to new and further subsidences that may be attributable to the wrongful removal of lateral support to which a mine-owner's land is entitled, it has been held that where the damage is the gist of the action, only such damage as had actually accrued at the date of the action can be recovered in the action, and that the further damage can be, and must be, recovered subsequently in one or more subsequent actions (*v*).

(*t*) *Mitchell* v. *Darley Main Colliery Co.*, L. R. 14 Q. B. D. 125; 11 App. Cas. 127 (citing *Bonomi* v. *Backhouse*, 9 H. L. Cas. 503).

(*u*) *Smith* v. *Kenrick*, 7 C. B. 515, 564; *Clegg* v. *Dearden*, 12 Q. B. 591; 17 L. J. Q. B. 233; *Nicklin* v. *Williams*, 10 Exch. 259.

(*v*) *Mitchell* v. *Darley Main Colliery Co.*, 14 Q. B. D. 125; 11 App. Cas. 125, in which case it was said by HALSBURY, L.C., that "the question is, whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidences. Now no one will think of disputing the proposition, that for *one* cause of action you must recover all damages incident to it by law *once and for ever*. . . . It is clear that no action would lie for the excavation,—for it is the damage, and not the excavation, which is the cause of action; and I cannot understand, why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered" (citing *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503, and *not following Lamb* v. *Walker*, 3 Q. B. D. 389, which was an action for damage attributable to the wrongful removal by the defendant of the lateral support to which the plaintiff's land was entitled, and wherein MANISTY, J., expressed the rule to be as follows: "The plaintiff's right of action was to have his land and buildings supported by the

The remedy in equity, in cases of trespass, is usually by injunction (*x*),—the bill generally praying for an injunction, an inspection, and an account; and the courts will grant that relief in all cases of trespass, whenever the damages would be an inadequate and uncertain remedy, and the protection of the right in specie is the only mode of doing complete justice between the parties (*y*).

The principle upon which an injunction to restrain a trespass is granted in cases of the encroachment of one mine-owner upon another, according as the trespass is committed under colour of title or not, is that where the defendant is in possession, and the plaintiff claiming possession seeks to restrain him from committing a trespass on the estate, the court will not interfere,—unless indeed the act is so flagrant a spoliation as to justify the court in departing from the general principle; and where the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under any colour of right, the tendency of the court, in the absence of special circumstances, is again not to interfere, but to leave the plaintiff to his remedy at law (*z*); but where the plaintiff is in possession and he seeks to restrain *one who claims by adverse title*, then the tendency of the court is to grant the injunction,—at least where the acts done tend to the destruction of the estate (*a*): Thus, an

subjacent and adjacent soil or strata; and so long as they were in fact supported, he had no cause of action; but so soon as the support which was left proved to be insufficient, and injury to the plaintiff's property ensued, then the defendant's act, in withdrawing the necessary support, became wrongful,—*damnum* and *injuria* then concurring, and the plaintiff's cause of action then accrued. . . . It is a well-settled rule of law, that damages resulting from one and the same cause of action must be assessed and recovered once for all; and it seems to me, that, in the present case, there is but one and the same cause of action, namely, that which I have already mentioned").

(*x*) *Brooksbank* v. *Smith*, 2 Y. & C. 58; *Denys* v. *Shuckburgh*, 4 Y. & C. 42.

(*y*) Judicature Act, 1873, s. 25 (8); *Mundy* v. *Duke of Rutland*, 23 Ch. D. 81.

(*z*) *Martin* v. *Douglas*, 16 W. R. 268.

(*a*) *Lowndes* v. *Bettle*, 10 Jur. (N.S.) 226.

injunction was granted restraining the defendants from digging coal under the plaintiff's close, which was situated between two collieries belonging to a person who had mortgaged them in fee to the defendants, the mortgagor having wrongfully and clandestinely run a large air-course and certain levels or underground roads through the plaintiff's mine to connect his two collieries, and having also wrongfully and clandestinely abstracted large quantities of the plaintiff's coal; these wrongful acts were not known to the mortgagees, but on subsequently taking possession as mortgagees, they continued to use the air-course and roads; and they also abstracted more of the plaintiff's coal (*b*).

It must, however, be said, that, in granting injunctions to restrain trespasses by mine-owners whose mines are in active operation, the court acts with greater reluctance than in ordinary cases of trespass; and this is because of the great loss which might accrue if the works were suddenly stopped (*c*); and not unfrequently the party whose mine is being trespassed upon would be left wholly to his legal remedy,—especially when he has been guilty of laches in applying for the protection of the court, or has apparently acquiesced in the tortious acts of his neighbour (*d*).

The court will also sometimes direct the payment of a way-leave rent, or of damages estimated on the footing of a way-leave rent, where the trespass has been secret and long continued (*e*); and also, sometimes, where the trespass has been open and unconcealed (*f*).

(*b*) *Powell* v. *Aiken*, 4 K. & J. 343. See also *Plant* v. *Stott*, 21 L. T. (N.S.) 106.

(*c*) *Anon.*, Amb. 209; *Grey* v. *Duke of Northumberland*, 13 Ves. 236; 17 Ves. 282.

(*d*) *Field* v. *Beaumont*, 1 Swans. 280; 1 B. & Ald. 247; *Jenkins* v. *Bushby*, 16 W. R. 189.

(*e*) *Jegon* v. *Vivian*, L. R. 6 Ch. 742; *Phillips* v. *Homfray*, L. R. 6 Ch. 770.

(*f*) *Whitwham* v. *Westminster Brymbo Coal Co.*, [1896] 1 Ch. 894; 2 Ch. 538.

INSPECTION OF MINES.—The principle, on which the court acts in granting inspection, where the mine of one owner is alleged to have been encroached upon by an adjoining owner, is that wherever it happens that a person has the power of making use of his land to the injury of another and there is *primâ facie* evidence of his doing it, even though contradicted and the real fact can only be ascertained by going upon that land for the purpose of inspecting it, and that inspection can be done without producing injury to the person whose land it is, an inspection will be directed (*g*).

On the other hand, where a *primâ facie* case of trespass is not made out, or in case the relief claimed is in itself doubtful, then, the right to inspection being only incidental to the right to relief, the inspection may be refused on an interlocutary application ; and in that case, it will be granted at the trial as part of the other and substantive relief then given, if any such is given.

TERMS AND FORM OF ORDER.—The order for inspection comprises, in general, all incidental directions for rendering the inspection effective ; and in a proper case, the order will also direct the removal of obstructions (*h*).

An order for inspection in the case of mines,—is always made upon terms ; and the terms usually imposed are,—that a reasonable notice in writing shall be given, stating

(*g*) *Bennitt* v. *Whitehouse*, 29 L. J. Ch. 326 ; 28 Beav. 119, in which it was said that "the court only requires a *primâ facie* case to enable it to make the order. . . . Suppose a man has a right to the surface of the ground, but no right to the minerals, and the person who has the right to the minerals says to the surface owner, 'You are sinking a shaft and getting the minerals which belong to me, and with which you have nothing to do, and you will not allow me to go upon your land to see whether that is done,'—would not the court, in such a case, allow him to go on the land to see whether the surface owner is sinking a shaft for that purpose ?" See also *Earl of Lonsdale* v. *Curwen*, 3 Bligh (O.S.) 168; *Walker* v. *Fletcher*, 3 Bligh (O.S.) 177 ; *Emor* v. *Barwell*, 6 Jur. (N.S.) 1233 ; *Lewis* v. *March*, 8 Hare, 97 ; *Attorney-General* v. *Chambers*, 12 Beav. 159 ; *Whaley* v. *Braucker*, 10 Jur. (N.S.) 535; *Bennett* v. *Griffiths*, 30 L. J. Q. B. 98.

(*h*) *Bennett* v. *Griffiths*, 30 L. J. Q. B. 98.

the time at which the applicant proposes that the inspection shall take place, and giving the names and descriptions of the persons whom he proposes as his agents for that purpose,—which agents must not be persons to whom the opposite party may reasonably object ; and the opposite party and his agents will usually be allowed to attend the inspection ; and if any obstructions require to be removed, the applicant is to be at liberty to remove the same, but at his own expense ; and he must not do unnecessary damage, and must make good all the damage he may do : Thus, in a modern case (*i*) which was an action against the defendants for undermining the plaintiff's house whereby it subsided, the order for inspection, granted on an interlocutory application, was in the following terms :— "It is ordered that the plaintiff's solicitors or agents be at liberty to take a copy of that portion of the colliery plan which shows the working of the defendants' mine under the plaintiff's house, premises, and lands, and within a reasonable distance thereof ; and further, that the plaintiff, his solicitors, and two viewers or colliery agents may forthwith, upon giving one day's notice to the defendants' solicitor or agent, inspect the working of the defendants' coal mines underlying the plaintiff's house, premises, and lands, and within a reasonable distance thereof, the plaintiff, his solicitor, and the said viewers or agents to be allowed the use of the defendants' shaft and cages for ascent and descent, and to be accompanied and guided by a person appointed by the defendants. The defendants to offer all reasonable facilities for access, but should there be any necessity for interfering with the ventilation, air-courses or ways, the defendants not to be obliged to interfere therewith unless ordered. Should there be any difficulty in carrying out this order, or as to the reasonableness of the distance, either party may apply farther ; the costs of and occasioned by this application to be costs in the cause."

(*i*) *Bell* v. *Lowe*, 10 Q. B. D. 547.

DAMAGES RECOVERABLE FOR INJURIES TO MINES.—Damage unattended with profit to the wrongdoer, and damage attended with profit will be distinguished by the court (*k*), and in the latter case an account will usually be directed; accordingly, in the case of mining trespasses, such account is a usual incident in every decree (*l*). And in taking that account, some distinctions are observed, that is to say:—In cases where the party committing the trespass is chargeable with fraud or negligence, one rule is applied; and in cases where he has acted inadvertently or under a *bonâ fide* belief of title, another rule is applied.

When there has been fraud or negligence, the damages recoverable will be the value of the minerals, at the time they first became chattels, without deducting the expense of getting them (*m*): Thus, where the Court thought the trespasser had been negligent (if not fraudulent), the measure of the damages was held to be the value of the coals at the time when they first existed as chattels, and the trespasser was held not to be entitled to any deduction for the expense of getting them (*n*); again, where a mining lessee had trespassed into the adjoining coal mine, and the evidence showed that he had had no justification whatever for the trespass, he was held liable to account for the value of the coals at the pit's mouth, being allowed what was just for the cost of raising the coal, but nothing for the costs of getting and severing it; and the decree directed an inquiry as to the

(*k*) *Powell* v. *Aiken*, 4 K. & J. 343.

(*l*) *Phillips* v. *Homfray*, [1892] 1 Ch. 465; L. R. 6 Ch. 770; 24 Ch. Div. 439; 44 Ch. D. 694. See also *Powell* v. *Rees*, 7 A. & E. 426.

(*m*) *Martin* v. *Porter*, 5 M. & W. 352.

(*n*) *Wild* v. *Holt*, 9 M. & W. 672, in which case it was observed by PARKE, B.: "As to the damages, the jury are at liberty to give the full value of the coals, calculated at the time they first exist as chattels, without deducting the expense of getting them, according to the rule laid down in *Martin* v. *Porter*, 5 M. & W. 352,—which rule is a very salutary one, because the parties must know,—at least they may know by proper dialling,—that they are trespassing on their neighbour's property."

market value at the pit's mouth of the coals worked and gotten by the defendants from the plaintiffs' mine, making to the defendants all just allowances for the cost and expenses incurred by them in bringing such coal to the pit's mouth, but not including the cost of getting or severing the coal ; and the defendants were ordered to pay to the plaintiffs the amounts which should appear, on the result of such inquiry, to be the value of the coal after deducting the amount of such allowances. And a further inquiry was directed, whether the plaintiffs had sustained any and what damage by reason of the defendants having broken through the boundary between their mine and the plaintiffs' mine ; and it was declared that the defendants were liable to pay to the plaintiffs the amount, if any, of the damage which should be ascertained on the result of such last-mentioned inquiry (*o*).

When the trespass has been inadvertent or under a *bonâ fide* belief of title, the sum payable by the defendant to the plaintiff will be the fair value of the coal, as if the coalfield had been purchased from the plaintiff at the fair market price (*p*) : Thus, where an account of coal tortiously abstracted by the defendant from the plaintiff's mine was ordered to be taken, and no fraud appeared, the account was limited to six years before the filing of the bill, but the Court thought, that once the quantity of the coal taken was ascertained, the onus would lie on the wrongdoer to prove that it was not (so far as it was not) taken within the six years (*q*) ; again where the trespass was committed under a *bonâ fide* belief of title, and the coal wrongfully worked lay under a small piece of land belonging to the plaintiff, and could not have been profitably worked by the plaintiff, the damages awarded were *the value of the coal to the*

(*o*) *Llynvi Co.* v. *Brogden*, L. R. 11 Eq. 188.

(*p*) *Hilton* v. *Woods*, L. R. 4 Eq. 432, following *Wood* v. *Morewood*, 3 Q. B. 440, n. ; but compare *Wild* v. *Holt*, 9 M. & W. 672.

(*q*) *Dean* v. *Thwaite*, 21 Beav. 621. See also *Trotter* v. *Maclean*, 13 Ch. D. 574 ; and distinguish *Hood* v. *Easton*, 2 Giff. 692 ; 2 Jur. (N.S.) 729 ; *Williams* v. *Ragget*, 25 W. R. 874.

plaintiff, that is to say, were the value thereof calculated on the basis of the royalty which the defendants paid on the other and neighbouring coal lawfully worked by them (*r*) ; and where coal had been wrongfully taken by working into the mine of an adjoining owner, the trespasser (there being no suggestion of fraud) was treated as the purchaser at the pit's mouth, and was ordered to pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowance) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*s*).

Apparently also, in either case,—that is to say, whether the working has been on the one hand fraudulent or negligent, or on the other hand inadvertent or under a *bonâ fide* belief of title,—the trespasser will be allowed, in general, the costs of raising the coal to the pit's mouth (*t*),—but not invariably so (*u*) ; and occasionally, but not invariably (*x*), he will be allowed also any royalties which he has been compelled to pay ; and also all other sums of money that necessarily must have been paid by the plaintiff himself to bring the mineral into the market (*y*).

C. Duty of mine-owners and mining lessees not to work under or within the prescribed distance from railways, canals, waterworks, and sewers. — IN GENERAL. — But for legislative provisions a railway company purchasing land for the purpose of its line, would have the same right of subjacent and adjacent support as a private individual purchasing land for any specific purpose, in contemplation at the time of the sale,

(*r*) *Livingstone* v. *Rawyard's Coal Co.*, 5 App. Cas. 25. See also *Ashton* v. *Stock*, 6 Ch. D. 719.

(*s*) *United Merthyr Collieries Company's Case*, L. R. 15 Eq. 46.

(*t*) *Morgan* v. *Powell*, 3 Q. B. 278 ; *Powell* v. *Aiken*, 4 K. & J. 343.

(*u*) *Llynvi Co.* v. *Brogden*, L. R. 11 Eq. 188.

(*x*) *Wild* v. *Holt*, 9 M. & W. 672.

(*y*) *Livingstone* v. *Rawyard's Coal Co.*, 5 App. Cas. 25.

known to the vendor (*z*) ; but in consequence of statutory provisions contained in the Railways Clauses Consolidation Act, 1845 (*a*), a railway company cannot claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created *a specific law* for such matters, and by that specific law alone the rights of the company and the mine-owner *inter se* are regulated (*b*), the operation of the principle applicable to a private individual being excluded within the prescribed distance from the railway, so that if the company declines to purchase the minerals, the mineral owner may work them,—working in a proper manner and according to the custom of the locality ; which if he do, he will not be responsible for any subsidence of the line (*c*).

UNDER STATUTE.—The railway company may, of course, upon its original purchase of the land, purchase also the mines and minerals within and under those lands, but usually it does not so do ; and if it do not purchase the mines and minerals simultaneously with its purchase of the surface, it cannot, probably, afterwards purchase them, under the provisions of the Railways Clauses Act. Apparently, however, it may effect the subsequent purchase of the mines and minerals within and under the lands by virtue of the Lands Clauses Consolidation Act, 1845 (*d*) ; for where a railway company had under its

(*z*) *Caledonian Rail. Co.* v. *Sprot*, 2 Macq. 449 ; *Caledonian Rail. Co.* v. *Belhaven*, 3 Macq. 56 ; *North Eastern Rail. Co.* v. *Crosland*, 32 L. J. Ch. 353 ; *Buchanan* v. *Andrew*, L. R. 2 H. L. Sc. 286 ; *Aspden* v. *Seddon*, L. R. 10 Ch. 394 ; *Smith* v. *Darby*, L. R. 7 Q. B. 716 ; *Gill* v. *Dickinson*, 5 Q. B. D. 159 ; *Bell* v. *Love*, 10 Q. B. D. 547 ; *Davis* v. *Treharne*, 6 App. Cas. 460 ; *Bell* v. *Earl of Dudley*, [1895] 1 Ch. 182.

(*a*) 8 & 9 Vict. c. 20.

(*b*) *Great Western Rail. Co.* v. *Bennett*, L. R. 2 H. L. 27 ; following *Dudley Canal Co.* v. *Grazebrook*, 1 B. & Ad. 59.

(*c*) *Great Western Rail. Co.* v. *Bennett*, L. R. 2 H. L. 27 ; *Fletcher* v. *Great Western Rail. Co.*, 5 H. & N. 689 ; 4 H. & N. 242 ; *Wyrley Canal Co.* v. *Bradley*, 7 East, 368 ; *London and North Western Rail. Co.* v. *Ackroyd*, 30 L. J. Ch. 588.

(*d*) 8 & 9 Vict. c. 18.

special Act the usual power to purchase lands, and had purchased certain surface lands accordingly (*e*), it was stated, that the company might, under s. 6 of the Lands Clauses Consolidation Act, 1845, afterwards purchase the minerals under those lands compulsorily, provided only that it made the compulsory purchase before the expiration of the time limited for the exercise of its compulsory powers,—there being nothing in the provisions of the Railways Clauses Act above set forth to take away the power given by the Lands Clauses Consolidation Act; *for the provisions referred to were for the benefit not of the mine-owner but of the company*, and exempted the latter from the obligation of buying the minerals simultaneously with the surface lands.

Mines of coal, iron-stone, slate, or other minerals, under land purchased by a railway company, are, by express statutory provision contained in the Railways Clauses Consolidation Act, 1845 (*f*), not the property of such company, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased (*g*); and all such mines, excepting as aforesaid, are deemed to be excepted out of the conveyance of the lands purchased, unless they are expressly named therein and conveyed thereby; and the word "mines" includes minerals whether got by underground or by open workings; but it is held that clay forming the surface or subsoil of land is not a mineral within this section (*h*), although it previously had been held that a bed of clay on which a

(*e*) *Errington* v. *Metropolitan District Rail. Co.*, 19 Ch. D. 559, following *Fletcher* v. *Great Western Rail. Co.*, 4 H. & N. 242; 28 L. J. Exch. 147; 29 L. J. Exch. 253. See also *Dixon* v. *Caledonian and Glasgow Rail. Co.*, 5 App. Cas. 820.

(*f*) 8 & 9 Vict. c. 20.

(*g*) 8 & 9 Vict. c. 20, s. 77.

(*h*) *Re an Arbitration between Todd, Birlaston & Co. and the North Eastern Rail. Co.*, 19 T. L. R. 249 (following *Glasgow* v. *Farie*, 13 App. Cas. 657; *Great Western Rail. Co.* v. *Blades*, [1901] 2 Ch. 624; 17 T. L. R. 693, and disapproving *Midland Rail. Co.* v. *Robinson*, 15 App. Cas. 19).

railway had been made was a mine, and therefore, unless expressly included in the deed to the company, excepted therefrom, and that unless the company were willing to make compensation for it, it might be dug and worked by the landowner (*i*) ; but although it was held that the mines which the owner was empowered to work after notice of his intention to work, included not only beds and seams of minerals got by underground working, but also such as could only be worked, and according to the custom of the district would be properly worked, by open or surface operations (*k*), it was regretted by a member of the court that clay gotten by workings from the surface had ever been held to be included in the word mines ; and it was held in a later case, respecting the construction of s. 18 of the Waterworks Clauses Act, 1847, that the common clay (or brick clay) forming the surface or subsoil of the lands, and which could only be worked by surface workings, was not included in the statutory exception of minerals contained in the conveyance of the surface lands to the railway company (*l*).

Yet, where the railway passed over a valuable bed of clay not included with the land purchased by the company for their undertaking, the owner was held entitled to work the clay from the surface, because the manner of working clay in the district was by open quarrying, and for that purpose to enter upon the land conveyed to the company, and to remove the ballast and surface soil lying above the clay, the company on due notice given of the intention to work having failed to purchase (*m*).

If the owner, lessee, or occupier of any mines or minerals lying under the railway, or under any of the works connected therewith, or within the prescribed

(*i*) *Midland Rail. Co.* v. *Haunchwood Brick, etc. Co.*, 20 Ch. D. 552.

(*k*) *Midland Rail. Co.* v. *Robinson*, 15 App. Cas. 19.

(*l*) *Glasgow Corporation* v. *Farie*, 13 App. Cas. 657. *Vide infra*, p. 122.

(*m*) *Ruabon Brick and Terra Cotta Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427.

distance therefrom,—or, where no distance is prescribed, within forty yards therefrom,—is desirous of working the same, he is to give to the company notice in writing of his intention so to do, thirty days before commencing to work; and the company may, on the receipt of such notice, cause the mines to be inspected, and if (as the result of such inspection) it appears to the company that the working thereof is likely to damage its works, and the company is willing to make compensation for such mines or any part thereof, then the owner, lessee, or occupier is not to work the same; and the amount of the compensation to be paid by the company for the mines so left unworked is, in the absence of an agreement providing otherwise, to be settled as in other cases of disputed compensation (*n*).

Moreover, it is provided that if and so far as the company does not within the thirty days state its willingness to pay the compensation, then the owner, lessee, or occupier may work the mines or the part thereof for which the company shall not have stated its willingness to pay the compensation, but so always that he work the mines *in a manner proper and necessary* for the beneficial working thereof, and according to the *usual manner* of working mines in the district, and at his own expense repair any damage and remove any obstruction occasioned to the railway by the improper working of the mines (*o*); and further, if such damage as aforesaid is not forthwith repaired, or such obstruction as aforesaid is not forthwith removed, or even without waiting for the owner, lessee, or occupier to do the necessary work, the company itself may execute the necessary work and recover the expense thereof by action against the party liable (*p*).

Where the company acquires only the right to make and maintain a tunnel in and through the land, and that easement in or through the land is acquired under

(*n*) 8 & 9 Vict. c. 20, s. 78.
(*o*) 8 & 9 Vict. c. 20, s. 79.
(*p*) 8 & 9 Vict. c. 20, s. 85.

the provisions above set forth,—then, equally as if it had purchased the land itself, the company is not entitled to support, either subjacent or adjacent, for the tunnel; and if thereafter the mine-owner duly complies with the provisions as to notice, etc., he may work the mines underlaying the tunnel; and if he, and so long as he, works the mines properly and according to the custom of the country, he may even withdraw the support to the tunnel, unless the company will purchase the minerals or, in other words, the right of support (*q*).

All the provisions aforesaid are, in general, incorporated in,—or the like provisions are, in general, expressly inserted in,—the special Acts of the company,—and in the special Acts relative to canals and other like public undertakings (*r*).

A special Act may, of course, give the right of support to a railway from the subjacent and adjacent mines; and where it gives the right, the provisions to the contrary contained in the Railways Clauses Consolidation Act, 1845, as above set forth, will not be applicable, even although the last-mentioned Act is incorporated in any subsequent special Act of the company; and the company will not be required to purchase the right of support on notice given by the mine-owner of his intention to work the mines; and the latter will be liable to be restrained by injunction from working the mines under or adjoining the railway, in such a manner as to cause a subsidence of the line (*s*).

Again it has been stated that where an express statutory right is given to make and maintain something requiring support, the statute (in the absence of a con-

(*q*) *London and North Western Rail. Co.* v. *Ackroyd*, 31 L. J. Ch. 588.

(*r*) *Elliott* v. *North Eastern Rail. Co.*, 10 H. L. 333; 1 J. & H. 145; 2 De G. F. & J. 423; *Swindell* v. *Birmingham Canal Co.*, 29 L. J. C. P. 364; *Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. 42; *London and North Western Rail. Co.* v. *Walker*, 19 T. L. R. 519.

(*s*) See *Great Western Rail. Co.* v. *Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157.

trolling contract) must be taken to mean that *the right of support shall accompany the right to make and maintain;* and just as it would be a strong argument against that construction of the Act, if the Act provided no means of obtaining compensation for the loss occasioned to the landowner by his having to leave the support, so conversely, if the Act provided the means of obtaining such compensation, that would be a strong argument in favour of the construction, and it would require a strong context to show that the right to support was not given; and it appearing in one case that the means of obtaining the compensation were in fact provided by the Act for the damage occasioned to the landowners by their mines being rendered unworkable,—the court held, that the legislature must be taken to have intended to give the right of support; and that the plaintiffs might have an injunction to restrain the defendant from withdrawing the support (*t*).

And, where the special Act of a canal company expressly reserved, to the persons from whom the land for the canal was purchased, the right of working the mines under the canal, *provided that no injury was done to the navigation*, it was held that the proviso imported merely that the party working the mines was to do no *unnecessary* damage to the navigation, or no extraordinary damage by working out of the usual mode, but that, subject to that limitation, he was free to work the mines, although the canal should be damaged thereby,—so always that he worked in a proper manner, and according to the custom of the country (*u*).

The person entitled to give notice under the Act of his intention to work a mine being the "*owner*, *lessee*, or *occupier*" thereof, the compensation to be paid to him by the company for not working the minerals, is the compensation to which individually he is entitled, to the

(*t*) *London and North Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16.

(*u*) *Dudley Canal Co.* v. *Grazebrook*, 1 B. & Ad. 59. See also *Stourbridge Navigation Co.* v. *Ward*, 30 L. J. Q. B. 108; *Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. 42.

extent of his own interest: if, therefore, it be the lessee who gives the notice, and who receives the compensation, the owner, if he can show a right of his own beyond that of his lessee, is also entitled to compensation according to the extent of his interest (*x*); and in order to justify the owner in giving the notice, it is not necessary that he should intend to work the minerals himself, though there must be a real and *bonâ fide* desire on his part to work, either by himself or by his lessees or licensees (*y*).

Where a railway company, or a canal company, are bound to make compensation if they stop the working of the mines under, or within, the prescribed distance from, the railway line, or the canal, they cannot stop the works beyond the prescribed distance, without making the mine-owner the same compensation as they would have had to make, if the mines had been under, or within, the prescribed distance from the railway or canal (*z*).

Where the owners of certain mines which lay under a railway gave the company notice of their intention to work them, and the company thereupon required a certain amount of support to be left, and arbitrators were appointed

(*x*) *Smith* v. *Great Western Rail. Co.*, 3 App. Cas. 165.

(*y*) *Midland Rail. Co.* v. *Robinson*, 15 App. Cas. 19.

Interest on purchase money of minerals.—Where the private Act of a railway company provided that, when the workings of a mine owner should get within a prescribed distance of a canal owned by the company, he should give to the company two months' notice of his intention to proceed with the working, and within such period should not work the minerals within the prescribed distance, and that the company might inspect the mine, and under certain circumstances give notice to the mine owner of its willingness to purchase the seam within the prescribed distance, for a sum by default of agreement to be settled by arbitration, in the manner provided for by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), and such notice was given, and an arbitration had, it was held that interest should be paid by the company from the date of it giving notice to purchase (*Fletcher* v. *Lancashire and Yorkshire Rail. Co.*, 18 T. L. R. 417).

(*z*) *Midland Rail. Co.* v. *Checkley*, L. R. 4 Eq. 19. See also *Birmingham Canal Co.* v. *Dudley*, 7 H. & N. 969; *Birmingham Canal Co.* v. *Swindell*, 7 H. & N. 980 n.; *Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. 42.

to settle the amount of compensation to be paid by the company in respect of the minerals required to be left unworked, and in respect of the continuous working of the mines being interrupted, and in respect of their being worked under restrictions so as not to affect the railway, it was held that the provisions of the Lands Clauses Act as to the assessment of the compensation applied, because the claim of the mine-owner was clearly under the seventy-eighth section of the Railways Clauses Consolidation Act, 1845 (*a*).

When a railway company on its purchase of the surface, purchases also portion of the underlying minerals, the rights and obligations which arise from the purchase are, as between the company and the owner of the remaining minerals, regulated and determined by the provisions of the Railways Clauses Consolidation Act, 1845, and therefore not dependent on the common law: Thus, where the company had given to the landowner a notice to treat in respect of certain land including all the minerals thereunder, *except the coal*, it was held that in the assessment of the compensation, the landowner would not be entitled to compensation in respect of coal which he would not be able to get without withdrawing the support from the minerals purchased by the company; and that his right to compensation in respect of the other coal would only arise, when the time arrived at which he was desirous of working that other coal (*b*).

Where the railway company built three lines of railway on parts of the piece of land compulsorily acquired by them and left the remaining parts open and unbuilt upon,—one of such latter parts forming a triangle within the three lines of railway, and the other parts thereof being two small pieces on the west of the railway lines,—and the landowner from whom the company acquired the

(*a*) 8 & 9 Vict. c. 20. See also *R.* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 512.

(*b*) *Re Lord Gerard and London and North Western Rail. Co.*, [1895] 1 Q. B. 459.

land owned the adjoining land on the east, and subsequently acquired the two severed pieces on the west, it was held that he might, having lawfully made a communication with the land sold to the railway company, under s. 79 of the Railways Clauses Consolidation Act, 1845, work the minerals thereunder by open workings,—that being the usual mode of working such minerals in the district where the same were situate, but that he was not entitled to any right of way over the railway,—and no right of way over the railway would be implied,—for the purpose of working the minerals; and the facts showing that he had parted with the adjoining land to the east,—and therefore was no longer the owner, lessee, or occupier of that land, it was further held that he had no right to work the minerals on, within, or under the land within the triangle by means of tunnels or passages constructed under the railway, but might work those minerals from the pieces of land on the west, getting compensation, possibly, from the company for the extra expense of working them (*c*).

Where by a special Canal Act it was provided that it should be lawful for the landowners to work the mines and minerals, under the lands to be compulsorily acquired, not thereby injuring or obstructing the canal; and it was also provided that, if in pursuing such mines they should work near or under the canal so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the owners of the mines to endanger or damage the further working thereof, the canal company should treat with the owners for all such minerals, near or under the canal, as should be thought proper to be left for the security of the canal or mines, the compensation or satisfaction to be paid for the minerals left unworked (failing agreement) to be settled by a jury; and that upon payment of such compensation, the mines were not to be worked within the limits for which the compensation should have been paid, it was held, that the owners

(*c*) *Midland Rail. Co.* v. *Miles*, 33 Ch. D. 632.

of a coal mine under and near to the canal who had given notice to the canal company of their intention to work the coal and, on the company declining to purchase or pay compensation for leaving the coal, had proceeded to work the coal,—doing so in the usual mode and without negligence,—were liable for the damage to the canal which resulted from the withdrawal of the necessary support, because it was fully competent for them under the Act to have initiated the proceedings required for the purpose of having the proper compensation provided by the Act ascertained and paid (*d*).

But where a special Act reserved to the owners of the lands in, upon, or through which the canal was to be made the mines and minerals within or under the lands to be compulsorily acquired, and authorised the owners to work such mines and minerals not thereby injuring the canal; and also provided, that if the owner of any mine should, in working such mines, work near to or under the canal, so as, in the opinion of the canal company, to endanger or damage the canal, or, in the opinion of the owner of the mines, to endanger or damage the further working of the mines, the company might treat with the owner for all minerals, near or under the canal, as should be thought proper to be left for the security or preservation of the canal, the compensation, failing agreement, to be settled and ascertained by a jury; it was held that an owner of mines *adjacent to, but not under the canal*, did not in respect of such mines come within the former provision, and so was under no statutory liability towards the canal company to abstain from working these mines; and, it appearing that the working of them near to the canal would not endanger or damage the general working of them further away from the canal, although it would cause some damage to the canal, it was further held, that the mine-owner could not insist against the will of the company upon minerals being left for the security and

(*d*) *Knowles* v. *Lancashire and Yorkshire Rail. Co.*, 20 Q. B. D. 391.

preservation of the canal, or upon receiving compensation from the company therefor,—the company being willing that the owner should work as he pleased, and preferring from time to time to bear the expense of necessary repairs to the canal rather than compensate the owner for his unworked minerals (*e*).

Where the railway line originally crossed a certain highway on the level, and the defendant company lawfully and properly working the coal underneath and adjacent to the railway and highway at the level, caused the highway to gradually subside,—the highway authority, a local board, doing nothing to maintain it at the old level,—but the railway did not subside, because the railway company maintained it, by ballast and otherwise, at its original level; and in consequence, the highway became obstructed by a sort of embankment across it,—it was held that the defendants were not liable for the obstruction of the highway, although in respect of its subsidence they were liable to the local board for nominal damages (*f*).

But where commissioners acting under powers conferred on them by a local inclosure Act, had set out certain public highways over the waste, and had directed that these highways should be maintained by the inhabitants and occupiers of the township in which they were situated, and that it should be lawful for all persons to use the same, and the Act reserved to the lord of the manor all mines, minerals, and quarries within or under the waste, with power to do every act necessary for working them, as fully and freely as he could have done in case the Act had not been made, and without paying compensation for any damage, and the lord who had worked the mines injured one of the roads set out by the commissioners, it was held in an action by the local

(*e*) *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1894] 2 Q. B. 632; [1895] A. C. 564.

(*f*) *Attorney-General* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301.

board, on whom the duty of repairing the road had devolved, to recover the expenses of the repairs, that the lord's right or title to the mines was subject to the rights of the public over the road ; and that the plaintiffs were therefore entitled to recover (*g*).

By the Waterworks Clauses Act, 1847 (*h*), it is provided that the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased ; and all such mines, excepting as aforesaid, are excepted out of the conveyance of the land, unless they are expressly conveyed thereby (*i*) ; and it is also provided that the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their underground pipes or works, or within forty yards, or other the prescribed distance, therefrom, desirous of working the same, is required to give the undertakers notice in writing of his intention so to do, thirty days before commencing to work the mines : so it is provided that an owner, lessee, or occupier of mines is not to work the mines if it appear to the undertakers that their working will cause damage, and they are willing to make compensation to such owner, lessee, or occupier thereof, the amount of the compensation to be paid by the undertakers for the mines so left unworked to be settled (failing agreement) as in other cases of disputed compensation (*k*).

(*g*) *Benfieldside Local Board* v. *Consett Iron Co.*, 3 Exch. 54.

(*h*) 10 Vict. c. 17.

(*i*) 10 Vict. c. 17, s. 18. *Vide supra*, p. 113.

(*k*) 10 Vict. c. 17, s. 22. Where a coal company gave a waterworks company notice that it was a lessee of seams of coal lying under and within the prescribed distance from a reservoir belonging to the water company and authorised to be made under a special Act which incorporated the Lands Clauses Act, 1845, and the Waterworks Clauses Act, 1847, and that it was desirous of working such seams and that it would so do after the expiration of the statutory time from the service of the notice, and the water

Moreover, it is further provided that if before the expiration of the thirty days the undertakers do not state their willingness to treat with the owner, lessee, or occupier, it shall be lawful for him to work the mines, so that no wilful damage be done to the works of the undertakers, and so that the mines be not worked in an unusual manner; and if any damage or obstruction is occasioned to the works of the undertakers by the working of the mines in an unusual manner, then the same shall be forthwith repaired or removed, as the case may require, and the damage made good by the owner, lessee, or occupier, at his own expense; and the undertakers may without waiting for the repairs, etc., to be done by the owner, lessee, or occupier, execute the same themselves and recover from the owner, lessee, or occupier the expense thereof by action against the party liable (*l*). Again, if the working of any such mines under the said works of the undertakers or within the prescribed distance therefrom, be prevented as aforesaid by reason of apprehended injury to such works, it shall be lawful for the respective owners, lessees, and occupiers of such mines to cut and make such and so many airways, headways, gateways, or water levels, through the mines, measures, or strata, the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work any mines or minerals on either side thereof; but no such airway, headway, gateway, or water level shall be of greater dimensions or sections than the prescribed dimensions or sections, and where no dimensions are prescribed, eight feet wide and

company notified the coal company of its willingness to make compensation for the latter's interest in the seams which were to be left unworked, it was held that the compensation should be assessed not only upon consideration of things which could be considered as possible at the time of the giving notice of willingness to buy and which admitted of a measure of compensation at that time, but also on the basis of the knowledge of a value subsequently acquired (*Re Byllfa and Merthyr Steam Collieries and Pontypridd Waterworks Co. Arbitration*, 19 T. L. R. 673 (reversing 18 T. L. R. 604; [1902] 2 K. B. 135)).

(*l*) 10 Vict. c. 17, s. 23.

eight feet high, or shall the airways, etc., be cut or made upon any part of the works so as to injure them in any way (*m*); and except where otherwise provided for by agreement, the undertakers shall from time to time pay to the owner, lessee, or occupier of any mines of coal, ironstone, or other minerals, extending so as to lie on both sides of any reservoirs, buildings, pipes, conduits, or other works, all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier by reason of the severance of the lands over such mines or minerals by such reservoirs or other works, or of the continuous working of such mines or minerals being interrupted as aforesaid, or by reason of the same being worked under the restrictions contained in this or the special Act, and for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works or by reason of such apprehended injury from the working thereof as aforesaid (*n*). And for the better ascertaining whether the mines are being worked or have been worked so as to cause damage, the undertakers may enter upon any lands through or near which their works are situate, and make use of any apparatus or machinery belonging to the owner, lessee, or occupier of the mines, for the purpose of discovering the distance between their works and the parts of the mines which are being worked or about to be worked (*o*); but nothing in this or the special Act shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks, in case the same had not been constructed (*p*).

And regarding the construction and application of the provisions lastly above set forth, it may be stated generally, that the decisions upon the corresponding clauses of the

(*m*) 10 Vict. c. 17, s. 24.
(*n*) 10 Vict. c. 17, s. 25.
(*o*) 10 Vict. c. 17, s. 26.
(*p*) 10 Vict. c. 17, s. 27.

Railways Clauses Act are applicable, without any material change (*q*).

D. Support to works and sewers of sanitary authorities.—By the Public Health Act, 1875 (*r*), all existing and future sewers within the district of the local (sanitary) authority are vested in such authority, other than private sewers, drainage sewers, and sewers under the control of the Commissioners of Sewers; and such authority may construct new sewers and acquire lands or easements for that purpose within their district; and they are charged with the maintenance of all sewers belonging to them, and with the alteration and improvement thereof (*s*).

And it is provided, that the sanitary authority may carry any sewer through, across, or under any turnpike road, or any street (*t*), or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and (after giving reasonable notice in writing) into, through, or under any lands whatsoever within their district, and also (subject to certain particular provisions) beyond their district,—but in the latter case, for the purpose of the outfall or distribution (*i.e.*, disposal) of the sewage only (*u*).

Notwithstanding that all streets repairable by the inhabitants at large within any urban district are by the Public Health Act, 1875, so far vested in the sanitary authority as to enable it to deal with the whole surface of the street between the houses on either side, and so much of the depth thereof as is or can be fairly used for the

(*q*) *Holliday* v. *Wakefield Corporation*, [1891] A. C. 81.

(*r*) 38 & 39 Vict. c. 55.

(*s*) 38 & 39 Vict. c. 55, ss. 13—16.

Misfeasance of the local authority renders it liable for accident caused when laying sewer (*Bull* v. *Shoreditch*, [1903] 19 T. L. R. 64).

(*t*) *Hill* v. *Wallasey Local Board*, [1894] 1 Ch. 133.

(*u*) 38 & 39 Vict. c. 55, s. 16.

ordinary purposes of a street (*x*), it has been stated that the sanitary authority is not by reason of the statute vested with mines under the street (*a*). Moreover, it is also provided that the Public Health Act, 1875, is not in any respect to interfere with, or to obstruct the efficient working of, mines of any description (*b*), and further, it has been expressly provided, by s. 27 of the Highways Act, 1878, that notwithstanding anything contained in the Public Health Act, 1875, all mines and minerals, of any description whatsoever, under any disturnpiked road or highway vested in an urban sanitary authority, shall belong to the person who would be entitled thereto, in case such road or highway had not become so vested; and the person entitled to any such mines or minerals shall have the same powers of working and of getting the same or other minerals, as if the road or highway had not become vested in the urban sanitary authority, but so nevertheless that no damage shall be done to the road or highway (*c*).

As regards the right of a sanitary authority to have its sewers supported by the subjacent and adjacent land, it has been held that there was nothing in the Acts relating to the Metropolitan Board of Works which conferred upón it any such right (*d*); but in a proceeding under the Public Health Act, 1875, to determine the amount of compensation to be paid by an urban sanitary authority to certain trustees, by reason of it having constructed, under the authority of the Act, certain sewers and works through, under, and upon the lands of the trustees, which contained mines and minerals that were in consequence of the construction of the sewers, unable to be worked and gotten in the usual mode of working without causing a subsidence of the surface, risk of injury to the sewer, and risk of

(*x*) 38 & 39 Vict. c. 55, s. 149.

(*a*) *Coverdale* v. *Charlton*, 4 Q. B. D. 104.

(*b*) 38 & 39 Vict. c. 55, s. 334.

(*c*) 41 & 42 Vict. c. 77, s. 27.

(*d*) *Metropolitan Board of Works* v. *Metropolitan Rail. Co.*, L. R. 3 C. P. 612; L. R. 4 C. P. 192.

percolation of sewage into the mines, it was held that the sanitary authority was entitled by the Act to have the sewers supported by the lands under or adjacent thereto, which, though it gave no express right to support for a sewer, gave an implied right because there was an *obligation* to construct a sewer, and also an obligation to keep it in repair; and that it was impossible to conceive that the legislature imposed such an obligation without at the same time giving the right to support (*e*).

However, by the express provisions of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (*f*), it was provided, as regards both vertical and lateral support, that the provisions contained in ss. 18 to 27 of the Waterworks Clauses Act, 1847, should be incorporated with the Act and with the special Act or provisional order under which this class of sewers are constructed; and also that the sanitary authority may by notice require a specified measure of support to be left for the sewers, as well within as beyond the distance of forty yards from the sewers, paying compensation to the landowners (*g*); but a sanitary authority is not, by reason only of anything contained in the special Act or provisional order, deemed to have acquired, or to be entitled to or bound to acquire, or to make compensation for, any right of support for such sanitary work as against any person owning or working, or being lessee or occupier of, or entitled to work, or otherwise interested, in any mine; and, on the other hand, nothing in the special Act or provisional order is deemed to have subjected to or to subject any such person to any liability to the sanitary authority in respect of damage to a sanitary work caused in or consequent upon the working of any mines in a reasonable manner; but where any right of support was acquired before the passing of the Act (25th August,

(*e*) *Corporation of Dudley* v. *Lord Dudley's Trustees*, 8 Q. B. D. 86.

(*f*) 46 & 47 Vict. c. 37.

(*g*) 46 & 47 Vict. c. 37, ss. 2, 3.

1883), and no compensation was at that date recoverable therefor, the Act does not apply to the sanitary work in respect of which such right of support was acquired, or operate to deprive the sanitary authority of such right, or entitle any person to any compensation in respect thereof, to which such person would not have been entitled but for the Act (*h*).

(*h*) 46 & 47 Vict. c. 37, s. 4.

CHAPTER VI.

A. Party walls and party fences outside the area of the London or Metropolitan Building Acts.—If two properties are separated by a wall, the presumption is, that the middle of the wall is the line of the boundary between them (*a*) ; but that presumption may, of course, be rebutted ; and divers distinctions require to be taken.

The words *party wall* may be used in four different senses,—a wall of which the two adjoining owners are tenants in common (*b*), and that is possibly the primary meaning of the phrase ; a wall divided longitudinally into two strips, one belonging to each of the two adjoining owners (*c*) ; a wall which belongs entirely to one of the adjoining owners, subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements ; and a wall divided longitudinally into two moieties, each moiety being subject to an easement in favour of the other moiety (*d*).

The property in a party wall erected at the joint expense of the two proprietors, as a general rule, follows the property of the land on which it stands, where the quantity of the land contributed by each proprietor is known ; that is to say, there is no transfer of the property

(*a*) *Vide supra*, p. 5.

(*b*) *Wiltshire* v. *Sidford*, 1 M. & R. 403 ; *Cubitt* v. *Porter*, 8 B. & C. 257.

(*c*) *Matts* v. *Hawkins*, 5 Taunt. 20.

(*d*) *Watson* v. *Gray*, 14 Ch. D. 192.

of either proprietor to the other, but both of them are and remain owners of their respective lands severally as before, each having the ordinary remedy for an injury done to the portion of the wall standing on his own soil (*e*) : but where the circumstances under which the wall was built are unknown, or are not clearly known, then it is presumed that the wall belongs to the two proprietors as tenants in common (*f*).

Where the wall is not common property, but one-half of it belongs exclusively to one proprietor and the other half of it exclusively to the other, either proprietor may be justified in pulling down the wall standing on his own land, although thereby sufficient support may not be left for the portion of the wall which belongs to his neighbour (*g*) : but that can rarely happen, for, in general, the grant of an easement conferring a right of mutual support will be implied. The mere circumstance, however, that the two walls are in juxtaposition will not of itself give the right of support, or render it necessary that a person pulling down his part of the wall should give notice of his intention so to do to the owner of the other part of the wall (*h*) ; but there must be special circumstances giving the right of support,—as, for instance, where the two walls are so built that one cannot stand without the support of the other ; or where both have been at one time in the hands of the same owner : for in the former case there is an easement of necessity (*i*), and in the latter the legal presumption is that, when the owner granted away one of the houses, he reserved to himself a right of

(*e*) *Matts* v. *Hawkins*, 5 Taunt. 20.

(*f*) *Wiltshire* v. *Sidford*, 1 M. & R. 403 ; 8 B. & C. 259 ; *Hutchinson* v. *Mains*, Al. & Nap. 155. See also Callis on Sewers, p. 74 (cited in *Duke of Newcastle* v. *Clark*, 8 Taunt. 627, 628).

(*g*) *Wigford* v. *Gill*, Cro. Eliz. 269 ; *Wiltshire* v. *Sidford*, 1 M. & R. 403 ; *Kempston* v. *Butler*, 12 Ir. C. L. R. 516.

(*h*) *Trower* v. *Chadwick*, 6 Bing. N. C. 1 ; 8 Scott, 1.

(*i*) *Suffield* v. *Brown*, 10 Jur. (N.S.) 114 ; 33 L. J. Ch. 249 ; *Pyer* v. *Carter*, 1 H. & N. 916 ; *Wheeldon* v. *Burrows*, 12 Ch. D. 31.

support for his own house adjoining, and, therefore, conferred on his grantee a similar right in respect of the house granted to him (*k*).

It appears doubtful whether a right of support can be gained for one house from another by mere lapse of time, —because there is great difficulty in implying a grant of an easement in cases where its enjoyment has not been open and as of right (*l*); and the difficulty is not got rid of by the fact, that the house for which support is claimed has been visibly out of the perpendicular for many years, —because the amount of support required can be only matter of conjecture: Thus, where the houses of the plaintiff and defendant were separated by a house belonging to a third person, the three houses adjoining one another, and having all been visibly out of the perpendicular for upwards of thirty years, and it did not appear how the leaning originated, or that there had ever been any connection between the houses, either with respect to title, possession, or occupation; but the facts showed that the defendant in pulling down his house caused the middle or adjoining house to sink, by reason whereof the plaintiff's house, having lost its support, fell down, it was held in an action brought to recover damages for the injury that, as the houses of the plaintiff and defendant did not adjoin, the plaintiff had gained no right of support for his house from the defendant's (*m*).

But when the right of support exists, *e.g.*, where two persons are owners in severalty of the two moieties of a party wall, *with cross rights of easement*, neither can pull down his own portion of the wall, without being liable for disturbing the rights of the other.

And even where no right of support exists, a party pulling down his wall, who proceeds so negligently,

(*k*) *Richards* v. *Rose*, 9 Exch. 218. See also *Brown* v. *Windsor*, 1 C. & J. 20; *Peyton* v. *Mayor of London*, 9 B. & C. 725; *Massey* v. *Goyder*, 4 C. & P. 161; *Murchie* v. *Black*, 19 C. B. (N.S.) 190.

(*l*) *Brown* v. *Windsor*, 1 C. & J. 20.

(*m*) *Solomon* v. *The Vintners' Co.*, 4 H. & N. 585; 28 L. J. Ex. 370.

irregularly, and improperly that his neighbour is subjected to more than ordinary risk, and an accident occurs, may be liable for the accident,—even where the party injured has not done all that he could for his own protection (*n*). And although the property injured may have been so infirm that it could have lasted only a few months longer, he may be liable in that case also; for no person has a right to accelerate the fall of his neighbour's house, —the age and condition of the property injured being merely a circumstance to be taken into consideration by the jury in determining the amount of the negligence and in assessing the proper damages (*o*): Thus, the defendants were held liable for carelessness in underpinning a party wall between their property and the plaintiff's, whereby injury occurred to the latter, the court holding that it made no difference, where the defendants conducted themselves so carelessly, negligently, and improperly in pulling down their house, and in omitting to use proper precautions in that behalf, whereby large quantities of bricks, mortar, etc., fell from the defendants' house into and upon the plaintiff's house, and broke his windows, skylights, etc., and occasioned other consequential damage, whether the plaintiff was owner in severalty of the half of the wall which was next his house, or whether he and the defendants were tenants in common of the whole wall (*p*); again, a lessor who had covenanted to repair and keep in repair all the external parts of demised premises, was held liable on his covenant to repair a boundary wall, although it adjoined other buildings,—the court saying, that the wall, even before the neighbouring house had been removed, was an external part of the demised premises, the external parts of premises being those which form the enclosure of them, and beyond which no part of them

(*n*) *Walters* v. *Pfeil*, M. & M. 364.

(*o*) *Dodd* v. *Holme*, 1 A. & E. 493; 3 N. & M. 739.

(*p*) *Bradbee* v. *Christ's Hospital*, 4 M. & Gr. 761. See also *Gayford* v. *Nicholls*, 9 Exch. 708; *Davis* v. *Blackwall Rail. Co.*, 1 M. & Gr. 799; *Jones* v. *Bird*, 5 B. & Ald. 837.

extends; and that it was immaterial, whether those parts were exposed to the atmosphere or rested upon and adjoined to other buildings which formed no part of the premises let (*q*).

Tenancy in common of a party wall or fence, it has been sometimes said, does not imply any obligation on the part of one tenant in common towards his co-tenant to repair (*r*); but this statement is extremely doubtful,—except as regards *ordinary* repairs (*s*); and it is most probably erroneous, as regards *necessary* repairs; for, at common law, where one tenant in common of a party wall refused to contribute his share to the repairs, he might have been compelled to fulfil his duty by the writ *de reparatione faciendâ;* and although that writ was abolished by the statute abolishing real actions, still the abolition is only of the writ, and not of the simplified action in the nature thereof (*t*).

If two persons are owners in severalty of the two moieties of a party wall, either may maintain trespass against the other for an injury done to his half of the wall (*u*), and may bring ejectment in case he is ousted of his half thereof (*x*); but trespass will not lie by one tenant in common against another, unless there has been some destruction of the common property, and ejectment will not lie, unless an actual ouster of the plaintiff from the common property by the defendant be proved (*y*): Thus, trespass will lie for pulling down a wall or destroying a tree, carrying away boundary stones, grubbing up

(*q*) *Green* v. *Eales*, 2 Q. B. 225. See also *M'Clure* v. *Little*, 19 L. T. (N.S.) 287.

(*r*) Gibbon on Dilapidations, 264.

(*s*) *Leigh* v. *Dickeson*, 12 Q. B. D. 194; 15 Q. B. D. 60.

(*t*) Co. Litt. 200 b.; F. N. B. 127. See 3 & 4 Will. 4, c. 27, s. 36.

(*u*) *Matts* v. *Hawkins*, 5 Taunt. 20.

(*x*) *Trotter* v. *Simpson*, 5 C. & P. 51; *Murly* v. *M'Dermott*, 8 A. & E. 138.

(*y*) *Stedman* v. *Smith*, 8 E. & B. 1; *Jacobs* v. *Seward*, L. R. 4 C. P. 328; 5 H. L. 464; *Watson* v. *Gray*, 14 Ch. D. 192.

a hedge, and the like injuries to the common property (*z*); but not for pulling down a wall with intent to rebuild it, though an action on the case in the nature of waste might under such circumstances lie (*a*), as it will in any other case where one tenant in common misuses the common property (*b*). Also, no action can be maintained by one tenant in common against another for merely clipping a hedge, or cutting trees in it of a proper age and growth,—because that would have the effect of enabling one tenant to prevent another from taking the fair profits of the estate (*c*). Moreover, if one of two tenants in common of a wall heightens it to a greater extent than is proper, it has been said that the only remedy of the other is to remove the addition (*d*): Thus, where the plaintiff and the defendant were respectively owners of adjoining houses, and at the rear of each of the houses there was a yard, and the two yards were separated by a wall, and it appeared that the plaintiff, in the course of erecting a shed in his back yard adjoining to the separation wall, built on the top of that wall without the defendant's permission a new piece of wall of a triangular shape, and the defendant knocked down this new piece of wall, the court was of opinion, that the defendant was justified in what he had done (*e*).

Where two persons are tenants in common of a party wall, each of them may enforce a partition of the wall, and the partition may be ordered to be made longitudinally (*f*), the difficulty of making a partition, or the inconvenience of it when made, being no ground

(*z*) *Cubitt* v. *Porter*, 8 B. & C. 270; *Noye* v. *Reed*, 1 M. & R. 63; *Murray* v. *Hall*, 7 C. B. 441; *Waterman* v. *Soper*, 1 Ld. Raym. 737; *Voyce* v. *Voyce*, Gow. 201; Co. Litt. 200 b.

(*a*) *Cubitt* v. *Porter*, 8 B. & C. 270.

(*b*) Co. Litt. 200 b.

(*c*) *Martyn* v. *Knollys*, 8 T. R. 145; *Jacobs* v. *Seward*, L. R. 4 C. P. 328; 5 H. L. 464.

(*d*) *Cubitt* v. *Porter*, 8 B. & C. 270.

(*e*) *Watson* v. *Gray*, 14 Ch. D. 192.

(*f*) *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

for depriving either owner of his legal right to a partition (*g*).

Where the defendants were the owners of two houses in a street, and of a gateway under one of them and adjoining the other, and they demised the latter house for a term of twenty-one years—the lease containing a covenant by the lessee to repair all walls and party walls belonging to the premises—and some years afterwards granted a lease to the plaintiff of the former house for a term of eleven years subject to a similar covenant to repair walls and party walls, it appeared that there was a party wall between the gateway and the house it adjoined to the height of the first floor, and that the house of the plaintiff, who was the lessee under the later demise, was built so as to extend in part over the top of the gateway and to rest upon this party wall between the gateway and the other house, and to be supported by it, but that the plaintiff's covenant to repair did not extend to this wall, and there was no covenant by the defendants to keep it in repair; and it was thereafter discovered that the walls of that part of the house which was above the gateway were giving way, the damage arising from the failure of the support from the party wall which had bulged in consequence of the pressure upon it from the plaintiff's premises, it was held, in an action against the defendants for this failure of the support, that there was no implied covenant on the part of the defendants to support the plaintiff's premises, and it was suggested by the court that it might be an answer to an action against the plaintiff on his covenant to repair, that the repair had been rendered impossible by the neglect of some precedent obligation on the part of the defendants (*h*).

When there is a boundary wall forming the side or end wall of a house, and abutting upon a street, and the wall has a stone in it containing an inscription, that the wall

(*g*) *Parker* v. *Gerard*, Amb. 236; *Warner* v. *Baines*, Amb. 589; *Turner* v. *Morgan*, 8 Ves. 142.

(*h*) *Colebeck* v. *Girdlers Co.*, 1 Q. B. D. 234.

belongs to the adjoining owner and not to the owner of the house, this effectually excludes the acquisition of the wall by adverse possession, and no question of the Statute of Limitations, or of adverse possession, or of cesser of possession can properly arise (*i*).

Many provisions are made in the Code Napoléon concerning party walls: Thus, in towns and fields, every wall which serves as a boundary between buildings, even to its base, or between courts and gardens, or even between inclosures in the fields, is to be presumed party, if there be no title or mark to the contrary (*k*); the reparation and rebuilding of party walls are to be at the expense of all those who have any claim thereto, and in proportion to the claim of each (*l*); and each inhabitant of a town or suburb can compel his neighbour to contribute to the construction and reparation of the inclosure forming the boundary there of the houses, courts and gardens, the height of the inclosure being fixed according to particular regulations or constant and acknowledged usages, and, in default of such usages and regulations, according to the directions of the Code (*m*).

B. Party walls within the area of the London or Metropolitan Building Acts.—IN GENERAL.—By the London Building Act, 1894 (*n*), repealing, but developing, like provisions contained in the Metropolitan Building Act, 1855 (*o*), an *external wall* is defined as any outer wall or vertical inclosure of any building not being a party wall: and a *party wall* (*p*) is defined as being either a

(*i*) *Phillipson* v. *Gibbon*, L. R. 6 Ch. 434.

(*k*) Code Napoléon, art. 653.

(*l*) Code Napoléon, art. 655.

(*m*) Code Napoléon, art. 663.

(*n*) 57 & 58 Vict. c. ccxiii., s. 5.

(*o*) 18 & 19 Vict. c. 122, s. 3.

(*p*) In *Weston* v. *Arnold*, L. R. 8 Ch. 1084, a case upon the Bristol Building Act (which, for all present purposes, is practically identical with the London Building Act), it appeared that the

wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners or occupied or constructed or adapted to be occupied by different persons; or a wall forming

plaintiff's house overlooked, on the south side thereof, a courtyard and outbuildings belonging to the defendants, built up against the plaintiff's house,—so that, *to the height of the first storey*, the wall of plaintiff's house was a party wall between the two buildings. The plaintiff's house, however, had two storeys above the first storey; and in the south wall had twelve windows,—all opening on the external air above defendant's outbuildings. The action was for an injunction restraining the defendant from building so as to obstruct the plaintiff's ancient lights, to wit, the said twelve windows in his south wall; and it was said, *per* JAMES, L.J., in giving judgment for the plaintiff, that "a party wall is a thing which belongs to two persons as part owners, or which divides two buildings one from another. It is beyond even the power of the legislature to make that a party wall which is not a party wall; they might no doubt make provisions to the effect that that which is not a party wall shall, for the purposes of a particular Act of Parliament, be deemed to be a party wall; but they cannot make what is not a party wall a party wall,—any more than they can make a square a circle. . . . A wall may in part of its length be a party wall, and in part of its length an external wall; and there is no distinction between height and length,—that is to say, a wall may be a party wall up to part of its height, and may be an external wall for the rest of its height. Property in London is intermixed in such a way that one man's basement and cellar often extend under another man's shop; and the first floor of one house is often over the shop of the next house; and in such case, there would be a party wall between the two buildings below, which above would only be a private partition between two rooms in the same house. There is nothing in fact or law to make it impossible or improbable that a wall should be a party wall up to a certain height, and above that height be the separate property of one of the owners."

The principle of this decision has been recognised and followed in *Drury* v. *Army and Navy Supply, Limited*, [1896] 2 Q. B. 271, a case arising on ss. 59 and 75 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), which contains certain provisions relative to the thickness of party walls and to the height thereof above the flat of the roof or gables, and relative to the dividing walls (sometimes called party walls) in buildings of the warehouse class; and it was there held, that a party wall ceased to be such and became (in effect) an external wall, where it ceased to be a dividing wall. See also *Crofts* v. *Haldane*, L. R. 2 Q. B. 194; *Corbett* v. *Hill*, L. R. 9 Eq. 671; *Laybourn* v. *Gridley*, [1892] 2 Ch. 53; *Watson* v. *Gray*, 14 Ch. D. 192.

part of a building and standing to a greater extent than the projection of the footings on lands of different owners (*q*).

A *cross-wall* is defined as meaning a wall used or constructed to be used in any part of its height as an inner wall of a building for separation of one part from another part of the building, that building being wholly in or being constructed or adapted to be wholly in, one occupation.

Again, a *party-fence wall* is, according to the statutes above mentioned, a wall used or constructed to be used as a separation of adjoining lands of different owners and standing on lands of different owners, and not being part of a building but so as not to include a wall constructed on the land of one owner the footings of which project into the land of another owner.

So a *party arch* is an arch separating adjoining buildings, storeys, or rooms, belonging to different owners, or occupied or constructed or adapted to be occupied by different persons, or separating a building from a public way or a private way leading to premises in other occupation ; and a *party structure* is defined as a party wall and also a partition floor or other structure separating verti-

(*q*) In *Knight* v. *Pursell*, 11 Ch. D. 412,—being an action in which the plaintiff was asking an injunction against the defendant to restrain him from pulling down a wall which stood wholly on the plaintiff's premises, and which was a *party structure* between the plaintiff's and defendant's premises—the plaintiff having on one side of the wall some sheds and closets, and the defendant having on the other side of the wall a larger roofed-in building resting against the wall and running along part of it,—the injunction granted was limited to the part of the wall which ran between the buildings, following the distinction taken in *Weston* v. *Arnold*, L. R. 8 Ch. 1084 ; and FRY, J., observed that it appeared to him, " on reading the definition of a party wall contained in the third section of the Act, that the intention is to define a party wall, *not by reference to the rights of ownership which the adjoining proprietors may have in any particular wall in dispute, but by reference to the mode of user of the wall ;* that is to say, *it is a question not of title, but of user ;* and therefore in order to determine whether this wall is a party wall, it is not necessary to consider what rights of ownership the plaintiff and defendant have, but what is the physical condition, position, and user of the wall."

cally or horizontally buildings, storeys or rooms approached by distinct staircases or separate entrances from without.

Moreover the expression *building owner* is defined as such one of the owners of adjoining land as is desirous of building or such one of the owners of buildings storeys or rooms separated from one another by a party wall or party structure as does or is desirous of doing a work affecting that party wall or party structure ; and *adjoining owner* is defined as the owner of the land or (as the case may be) of the buildings adjoining those of the building owner (*r*).

Also, it was further provided as regards party walls, that in either of the following cases, that is to say, first, when a wall was after 31st December, 1894, built as a party wall in any part ; or secondly, where a wall built before or after that date becomes afterwards a party wall in any part,—the wall shall be deemed a party wall for such part of its length as is so used (*s*).

WITH RESPECT TO BUILDING OWNERS the following provisions as to *party walls* and the like are contained in the London Building Act, 1894 (*t*) :

"Where lands of different owners adjoin and are unbuilt on at the line of junction and either owner is about to build on any part of the line of junction the following provisions shall have effect :

"(1) If the building owner desire to build a party wall on the line of junction he may serve notice

(*r*) 57 & 58 Vict. c. ccxiii., s. 5. See also *List* v. *Tharp*, [1897] 1 Ch. 260.

(*s*) 57 & 58 Vict. c. ccxiii., s. 58.

The Metropolitan Building Act, 1855, by s. 4, extended to,—and the London Building Act, 1894, by s. 4, extends to,—all places within the limits of the metropolis as defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 249, 250, that is to say, the city of London (including all parts within the jurisdiction of the Commissioners of Sewers) and the parishes and places mentioned in the Schedules A., B., and C., which are appended to the last-mentioned Act, viz., St. Marylebone, St. Pancras, etc., Paddington, etc., St. John, Hampstead, etc., Whitechapel, etc., Plumstead, etc., Rotherhithe, etc., Lincoln's Inn, etc.

(*t*) 57 & 58 Vict. c. ccxiii., s. 87.

thereof on the adjoining owner describing the intended wall :

"(2) If the adjoining owner *consent* to the building of a party wall the wall shall be built half on the land of each of the two owners or in such other position as may be agreed between the two owners :

"(3) The expense of the building of the party wall shall be from time to time defrayed by the two owners in due proportion regard being had to the use made and which may be made of the wall by the two owners respectively :

"(4) If the adjoining owner *do not consent* to the building of a party wall the building owner shall not build the wall otherwise than as an external wall placed wholly on his own land :

"(5) If the building owner do not desire to build a party wall on the line of junction but desires to build an external wall placed wholly on his own land he may serve notice thereof on the adjoining owner describing the intended wall : and

"(6) Where in either of the cases aforesaid the building owner proceeds to build an external wall on his own land he shall have a right at his own expense at any time after the expiration of one month from the service of the notice to place on the land of the adjoining owner below the level of the lowest floor the projecting footings of the external wall with concrete or other solid substructure thereunder making compensation to the adjoining owner or occupier for any damage occasioned thereby the amount of such compensation if any difference arise to be determined in the manner in which differences between building owners and adjoining owners are" elsewhere in the Act directed to be determined :

"Where an external wall is built against another external wall or against a party wall it shall be

lawful for the district surveyor to allow the footing of the side next such other external or party wall to be omitted" (*u*).

Also, it is provided that the building owner (*x*) shall have

"(1) A right to make good underpin or repair any party structure which is defective or out of repair :

"(2) A right to pull down and rebuild any party structure which is so far defective or out of repair as to make it necessary or desirable to pull it down (*y*) :

"(3) A right to pull down any timber or other partition which divides any buildings and is not conformable with the regulations of this Act, and to build instead a party wall conformable thereto :

"(4) In the case of buildings having rooms or storeys the property of different owners intermixed a right to pull down such of the said rooms or storeys or any part thereof as are not built in conformity with this Act and to rebuild the same in conformity with this Act:

"(5) In the case of buildings connected by arches or communications over public ways or over passages belonging to other persons a right to pull down such of the said buildings arches or communications or such parts thereof as are not built in conformity with this Act and to rebuild the same in conformity with this Act :

"(6) A right to raise and underpin any party structure permitted by this Act to be raised or underpinned or any external wall built against such party structure upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner, on or against such party structure or external wall :

(*u*) *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

(*x*) 57 & 58 Vict. c. ccxiii., s. 88, *corresponding* with 18 & 19 Vict. c. 122, s. 83.

(*y*) *Debenham* v. *Metropolitan Board of Works*, 6 Q. B. D. 112.

"(7) A right to pull down any party structure which is of insufficient strength for any building intended to be built, and to rebuild the same of sufficient strength for the above purpose upon condition of making good all damages occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof (*z*):

"(8) A right to cut into any party structure upon condition of making good all damage occasioned to the adjoining premises by such operation:

"(9) A right to cut away any footing or any chimney breasts jambs or flues projecting or other projections from any party wall or external walls in order to erect an external wall against such party wall or for any other purpose upon condition of making good all damage occasioned to the adjoining premises by such operation:

"(10) A right to cut away or take down such parts of any wall or building of an adjoining owner as may be necessary in consequence of such wall or building overhanging the ground of the building owner in order to erect an upright wall against the same on condition of making good any damage sustained by the wall or building by reason of such cutting away or taking down:

"(11) A right to perform any other necessary works incident to the connection of a party structure with the premises adjoining thereto. But the above rights shall be subject to this qualification that any building which has been erected previously to the date of the commencement of the Act shall be deemed to be conformable with the provisions of the Act if it be conformable with the provisions of the Acts of Parliament regulating buildings in London before the commencement of the Act.

Moreover the building owner shall also have a right to raise a party-fence wall or to pull the same down and rebuild it as a party wall."

(*z*) *Williams* v. *Golding*, L. R. 1 C. P. 69.

AND AS REGARDS THE RIGHTS OF ADJOINING OWNERS it is provided (*a*) that :

"(1) Where a building owner proposes to exercise any of the foregoing rights with respect to party structures the adjoining owner may by notice require the building owner to build on any such party structure such chimneys copings jambs or breasts or flues or such piers or recesses or any other like works as may fairly be required for the convenience of such adjoining owner and as may be specified in the notice and it shall be the duty of the building owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building owner or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right :

"(2) Any difference that arises between a building owner and an adjoining owner in respect of the execution of any such works shall be determined in manner in which differences between building owners and adjoining owners are elsewhere in the Act directed to be determined."

AND AS REGARDS THE RIGHTS OF BUILDING OWNERS AND ADJOINING OWNERS respectively, the Act provides (*b*) that :

"(1) A building owner shall not except with the consent in writing of the adjoining owner and of the adjoining occupiers or in cases where any wall or party structure is dangerous (in which cases the provisions of Part IX. of the Act shall apply) exercise any of his rights under the Act, in respect of any party-fence wall unless at least one month or exercise any of his rights under the Act in relation to any party wall or party structure other than a party-fence wall unless at least two months before doing so he has served on the adjoining owner a party wall or party structure notice stating the nature and particulars of the proposed work and the time at which the work is proposed to be commenced.

(*a*) 57 & 58 Vict. c. ccxiii., s. 89.

(*b*) 57 & 58 Vict. c. ccxiii., s. 90. See also *Hobbs* v. *Groves*, [1899] 1 Ch. 11 ; *Major* v. *Park Lane Co.*, L. R. 2 Eq. 453.

"(2) When a building owner in the exercise of any of his rights under the Act lays open any part of the adjoining land or building he shall at his own expense make and maintain for a proper time a proper hoarding and shoreing or temporary construction for protection of the adjoining land or building and the security of the adjoining occupier.

"(3) A building owner shall not exercise any right by the Act given to him in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or to the adjoining occupier.

"(4) A party wall or structure notice shall not be available for the exercise of any right unless the work to which the notice relates is begun within six months after the service thereof and is prosecuted with due diligence.

"(5) Within one month after the receipt of such notice the adjoining owner may serve on the building owner a notice requiring him to build on any such party structure any works to the construction of which he is hereinbefore declared to be entitled.

"(6) The last-mentioned notice shall specify the works required by the adjoining owner for his convenience and shall (if necessary) be accompanied by explanatory plans and drawings.

"(7) If either owner do not within fourteen days after the service on him of any notice express his consent thereto he shall be considered as having dissented therefrom and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner" (*c*).

And further, it is provided (*d*) that:

"Where a building owner intends to erect within ten feet of a building belonging to an adjoining owner a building or structure any part of which within such ten feet extends to a lower level than the foundations of the building belonging to the adjoining owner he may and if required by the adjoining owner shall (subject as

(*c*) As to differences, see *Ex parte McBryde*, 4 Ch. D. 200; *Standard Bank, etc.* v. *Stokes*, 9 Ch. D. 68.

(*d*) 57 & 58 Vict. c. ccxiii., s. 93.

hereinafter provided) underpin or otherwise strengthen the foundations of the said building so far as may be necessary and the following provisions shall have effect:

"(1) At least two months' notice in writing shall be given by the building owner to the adjoining owner stating his intention to build and whether he proposes to underpin or otherwise strengthen the foundations of the said building, and such notice shall be accompanied by a plan and sections showing the site of the proposed building and the depth to which he proposes to excavate:

"(2) If the adjoining owner shall within fourteen days after being served with such notice give a counter-notice in writing that he disputes the necessity of or require such underpinning or strengthening a difference shall be deemed to have arisen between the building owner and the adjoining owner:

"(3) The building owner shall be liable to compensate the adjoining owner and occupier for any inconvenience loss or damage which may result to them by reason of the exercise of the powers conferred by this section:

"(4) Nothing in this section contained shall relieve the building owner from any liability to which he would otherwise be subject in case of injury caused by his building operations to the adjoining owner" (*e*).

REMEDIES OF BUILDING AND ADJOINING OWNERS.—The provisions of the Building Acts relative to the avoidance of unnecessary damage and to the repairing of the actual damage done are specific, and in general supply a party injured with a complete remedy and protection. But these specific provisions are really only an expression for the most part of what the law would ordain apart from them; for, by the common law a man, who orders to be

(*e*) *Bower* v. *Peate*, 1 Q. B. D. 321; *Dalton* v. *Angus*, 6 App. Cas. 740.

executed on his own premises work lawful in itself but from which injurious consequences must in the natural course of things be expected unless means are adopted for their prevention, is bound to see to the doing of all that is necessary for their prevention ; and cannot relieve himself of his responsibility by employing a contractor for the purpose : Therefore, where the plaintiff and defendant were respectively owners of two adjoining houses, the plaintiff being entitled to support, for his house, of defendant's soil, and the defendant employed, for the purpose of pulling down his house, excavating the foundations and rebuilding the house, a contractor who undertook the risk of supporting the plaintiff's house, as far as might be necessary, during the work, and to make good any damage, and to satisfy any claims arising therefrom, and the plaintiff's house was injured in the progress of the work, owing to the insufficient means taken by the contractor to support it, the defendant was held liable (*f*) ; so where it appeared that plaintiff and defendant were owners of adjoining houses, between which was a party wall the property of both, and that the latter's house also adjoined a third party's house and between them was a party wall, and the defendant employed a builder to pull down his house and rebuild it on a plan which involved the tying together of the new house and the party wall between it and the plaintiff's house so that if one fell the other would be damaged, and in the course of the rebuilding the builder's workmen in fixing a staircase negligently and without the knowledge of the defendant cut into the party wall between his house and that of the third party, in consequence whereof the defendant's house fell and the fall dragged over the party wall between it and the plaintiff's house, which was thereby injured,—the cutting into the party wall not having been authorized by the contract between the defendant and his builder, it was held, that the defendant could not get rid of the duty cast

(*f*) *Bower* v. *Peate*, 1 Q. B. D. 321. See also *Dalton* v. *Angus*, 6 App. Cas. 740.

upon him by the law to see that reasonable care and skill were exercised in those operations, by delegating the performance of the work to a third person (*g*); again in an action for damage occasioned to the plaintiff's house by the defendant, as contractor for the building owner, through insufficient underpinning of the party wall, it was stated that the right which the building owner was exercising was a right to cut into any party structure, upon condition of making good all damage occasioned to the adjoining premises by such operation, given to him by the Metropolitan Building Act, 1855 (*h*); and the defendant, being lawfully employed by the building owner, had a right, under the statute, to undermine the plaintiff's wall, on the condition of making good all damage occasioned thereto by such operation; and if he failed to make good such damage, he did not perform the condition on which his right to do the act depended; in other words, having done that which was an actionable wrong at common law, and having broken the condition upon which the statute made the act justifiable, he was liable for the damage, there being nothing in the statute which, in such case, took away the common law right (*i*).

COMPLIANCE WITH BUILDING ACTS.—A building owner, to obtain the benefit of the provisions contained in the Acts, must duly comply with those provisions,—even in matters of an apparently incidental and subordinate character: Thus, in an action to restrain the defendant from underpinning a certain party structure before the prescribed directions of the surveyors had been obtained, it was said that the right of a building owner with respect to underpinning a party structure was a right merely to do that which the surveyors might direct should be done, and that the building owner had no right to do anything at all until he had obtained such directions (*k*).

(*g*) *Hughes* v. *Percival*, 8 App. Cas. 443.
(*h*) 18 & 19 Vict. c. 122, s. 83.
(*i*) *Williams* v. *Golding*, L. R. 1 C. P. 69.
(*k*) *Standard Bank* v. *Stokes*, 9 Ch. D. 68.

The Acts, however, should be read in a reasonable manner, thus, a building owner having, under the Acts, a right to pull down a party structure, has also, of course, the right to underpin it, when that will be sufficient (*l*),—upon the principle *omne majus continet in se minus.*

The notice prescribed by the Building Acts, of the building owner's intention to remove a building adjoining the premises of another owner, appears, however, not to be required in every case of the mere removal of a building, but to be required only, *e.g.*, when the removal will disturb any party structure between the two buildings (*m*); or when, *e.g.*, the building intended to be removed is so constructed that its supports form part of the party structure,—in which latter case, the building owner must undoubtedly give the prescribed notice of intention, although in the proposed re-erection he may not intend to make any further use of the party structure (*n*).

(*l*) *Standard Bank* v. *Stokes*, 9 Ch. D. 68.

(*m*) *Major* v. *Park Lane Co.*, L. R. 2 Eq. 453.

(*n*) *Major* v. *Park Lane Co.*, *supra.*

Contribution towards expense of raising party wall.—An owner who has for his own benefit added to the height of a party wall should at any rate in the first instance bear the whole of the expense, and an adjoining owner who afterwards makes use of the increased height of the wall should contribute thereto under s. 95 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.). The statute, however, does not contain any provision for transferring to a tenant who has not contributed to the initial expense, the whole or any part of his lessor's right to contribution, and a claim therefor should not be entertained by arbitrators acting under s. 91 of the Act (*In re an Arbitration between Stone and Hastie*, 19 T. L. R. 654).

CHAPTER VII.

A. Duty of occupying tenant to maintain and repair fences and his right to estovers for that purpose.—The occupier of property is, in general, liable for an injury arising from the fences being out of repair, and the duty to repair them is so little that of an owner not in actual occupation, that he may maintain an action against his own tenant for omitting to repair (*a*); accordingly an action to recover damages for an injury arising out of the fences being out of repair should be brought against the occupier, and a declaration describing and charging the defendant simply as owner and proprietor has been held obnoxious to a demurrer, because these words do not necessarily imply that the party sued is also the *occupier* of the premises (*b*).

However, if the landlord has taken the burden of repairing the premises on himself, and has neglected his

(*a*) *Cheetham* v. *Hampson*, 4 T. R. 318, in which case it was said by Lord KENYON that the situation of a landlord would be deplorable if he was liable to be harassed by third parties with actions for the culpable neglect of his tenants. See also *R.* v. *Watts*, 1 Salk. 357.

(*b*) *Russell* v. *Shenton*, 3 Q. B. 449. See also *Chauntler* v. *Robinson*, 4 Exch. 163; *R.* v. *Bucknall*, 2 T. R. 804; *Coupland* v. *Hardingham*, 3 Camp. 398; *Leslie* v. *Pounds*, 4 Taunt. 649; *Mills* v. *Holton*, 2 H. & N. 14; *Rooth* v. *Wilson*, 1 B. & Ald. 59; *Broadwater* v. *Blot*, Holt. 547.

duty in that behalf, whereby injury has occurred, he may be sued (*c*) ; so if he has let the premises in such a state that they are, or, under ordinary circumstances, must become, a nuisance to the public or to the adjoining owners : but he is not liable for a nuisance created by the tenant himself, unless, having the power of determining the tenancy, he omits so to do, or unless he re-lets the premises with the nuisance existing upon them (*d*).

A lessee for years, or for life, has a general or absolute property in the hedges and bushes, and in the trees not being timber trees, and also in the cuttings thereof. If, therefore, he suffers hedges or trees, not being timber trees, to be cut down or lopped, the property in such cuttings belongs to him (*e*) ; if, however, he abuse his authority in this respect, and grub up or destroy fences, whereby the identity of the property is destroyed and the inheritance injured, he may subject himself to an action in the nature of waste at the suit of the landlord ; and he may also, in such case, be restrained by injunction (*f*). And the tenant will be liable, if, *e.g.*, there be a quickset fence of white thorn, and he grubs it up or suffers it to be destroyed, for that is waste ; but he will not be liable, *semble*, if he merely grubs up bushes, furze, and thorns for melioration, for that shall be accounted rather as good husbandry (*g*).

The express provisions of the tenancy agreement must, of course, be regarded,—and especially when the agreement is in writing, and amounts to a demise : Thus, where an

(*c*) *Payne* v. *Rogers*, 2 H. Bl. 348 ; *Todd* v. *Flight*, 9 C. B. (N.S.) 377, 389.

(*d*) *R.* v. *Pedley*, 1 A. & E. 822 ; *Rosewell* v. *Prior*, 12 Mod. 639 ; 2 Salk. 460 ; *White* v. *Phillips*, 15 C. B. (N.S.) 245 ; *Gandy* v. *Jubber*, 5 B. & S. 78, 485 ; *Bartlett* v. *Baker*, 34 L. J. Exch. 8 ; *R.* v. *Bradford Navigation Co.*, 6 B. & S. 631 ; *Thompson* v. *Gibson*, 7 M. & W. 462.

(*e*) 4 Rep. 62 ; 1 Roll. Ab. 181 ; Comyn's Dig. Biens. H.

(*f*) *Berriman* v. *Peacock*, 9 Bing. 384 ; *Johnstone* v. *Symons*, 9 L. T. 535 ; Yool on Waste, 65.

(*g*) Co. Litt. 53 a ; *Gage* v. *Smith*, Godb. 298 ; *Malevérer* v. *Spinke*, Dyer, 37 a ; *Doe* d. *Grubb* v. *Burlington*, 5 B. & Ad. 507.

indenture of demise contained an exception of all timber, and of all timberlike and other trees, and also of all bushes and thorns, other than such bushes and thorns as should be necessary for the repair of the fences, and the lessee covenanted to keep the fences in repair during the term, finding all materials, except rough timber, stakes, and bushes, which, if growing on the premises, the lessor himself covenanted to provide, it was held that the provision as to bushes and thorns necessary for repairs was *not an exception out of the exception;* but that all trees, bushes, and thorns were excepted out of the demise, whether part of the fences or not, or whether necessary for repairs or not, and that the tenant could not take any of the said thorns and bushes for repairs, *until they were set out to him by the landlord* (*h*).

But where the lease contains a clause empowering the lessee to take hedge-bote by assignment of his landlord, it rather appears that he may take it, although it be not assigned, the provision as to assignment not taking away his common law right of estovers; though it would be otherwise, if the lessee should have covenanted (negatively), that he would not take it until assignment (*i*).

The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage his farm in a husbandlike manner (*k*); and one of the duties devolving upon him in consequence of this implied promise, in the absence of any express agreement to the contrary, is, that he shall maintain the fences of the property demised to him (*l*). For this purpose he is entitled to reasonable estovers (*m*); and he may, in general, cut timber to keep the walls, pales, fences, hedges, and ditches in the same state of repair in which

(*h*) *Jenny* v. *Brook*, 6 Q. B. 323.

(*i*) Bacon, Ab. Waste, F., p. 394; 1 Com. Dig. tit. 3, c. 1, s. 18.

(*k*) *Powley* v. *Walker*, 5 T. R. 373.

(*l*) *Cheetham* v. *Hampson*, 4 T. R. 318.

(*m*) Co. Litt. 41 b.

he found them (*n*) ; but it has been said he cannot make new fences or other erections without being liable for waste (*o*), and, at all events, if he makes a new fence or a new house, he will be obliged to keep it in repair (*p*).

If there is no proper wood on the premises for repairs, the tenant, it has been said, is not obliged to purchase other wood, but is discharged from his liabilities in this respect (*q*) ; however, where a declaration was against a tenant for not using the premises demised to him in a husbandlike manner, and for not repairing the fences, a plea that there was no proper wood which he had a right to cut for repairs, and that the plaintiff ought to have set out proper wood for the purpose, was no sufficient defence (*r*).

A tenant may not cut down estovers on one estate and apply them in making repairs upon another (*s*) ; and if he sell the timber cut, and, with the produce thereof, pay the wages of workmen, or even if he exchange the wood for timber better suited for the repairs wanted, or better seasoned, he is liable to an action in the nature of waste (*t*). Again, the tenant may not cut down timber for future repairs (*u*), or for repairs that are wanted through his own default, for to cut timber to repair waste, it has been said, is double waste (*x*) : but, where in ejectment against a tenant for cutting down timber not immediately applied in remedying existing defects and in excess of the quantity required, the jury found that it was cut *bonâ fide* for the purpose of making necessary repairs,

(*n*) Co. Litt. 53 b.

(*o*) Co. Litt. 53 b ; Dyer, 332.

(*p*) Co. Litt. 53 a.

(*q*) Gibbon on Dilapidations, 200.

(*r*) *Whitfield* v. *Weedon*, 2 Chitty, R. 685.

(*s*) *Lee* v. *Alston*, 1 Bro. C. C. 196 ; 3 Bro. C. C. 37.

(*t*) *Lewis Bowle's Case*, 11 Rep. 79 b ; *Simmons* v. *Norton*, 7 Bing. 640 ; *Attorney-General* v. *Stawell*, 2 Anst. 601 ; *Whitfield* v. *Bewit*, 2 P. Wms. 242 ; *Gower* v. *Eyre*, Cooper, C. C. 156.

(*u*) *Georges* v. *Stanfield*, Cro. Eliz. 593 ; Cruise's Dig. Estates for Life, ss. 19, 20.

(*x*) Co. Litt. 53 b.

and was intended to have been so applied in due course, the court refused to disturb the verdict (*y*). Also, it appears that a lessee who takes reasonable estovers for repairing hedges and fences, is not chargeable with waste, merely by reason of his having entered into an express covenant to repair at his own charge, or by reason of the lessor having covenanted to do the repairs himself (*a*).

By the Irish statute 31 Geo, 3, c. 40, lessees and tenants generally were, in effect, deprived of estovers, but they might take them by express agreement with their landlord,—the Act, however, not being applicable to lessees whose leases were renewable for ever.

CONSEQUENCES OF THE TENANT'S BREACH OF DUTY TO MAINTAIN FENCES.—A tenant who has been guilty of a breach of covenant to keep the fences, etc. in repair, for which the lessor has a right of re-entry, is not entitled to the specific performance of a covenant for renewal (*b*). And even if there were no right of re-entry, yet the court seeing a gross piece of waste, which would in all cases be a forfeiture of the place wasted, and a gross breach of covenant that could not be well indemnified by damages, would leave the tenant to his remedy at law, and grant no relief in equity (*c*). Moreover, it has been said that if during the existence of a lease such a breach of covenant was committed by the tenant, as that a court of equity would not have interfered to prevent the landlord from taking advantage of the forfeiture of the lease, had he known of the breach and proceeded to determine the lease, he ought not to be placed in a worse situation after the expiration of the term, than he would have been in had he known of the breach and availed himself of it before the term expired (*d*).

(*y*) *East* v. *Harding*, Cro. Eliz. 478.

(*a*) Comyn, Dig. Waste, D. 5 ; Comyn, Dig. Plead. 3, O. 14.

(*b*) *Hill* v. *Barclay*, 18 Ves. 56 ; 16 Ves. 402 ; *White* v. *Warner*, 2 Mer. 459.

(*c*) *Gourlay* v. *Duke of Somerset*, 1 V. & B. 68 ; *Coppinger* v. *Gubbins*, 9 Ir. Eq. Rep. 304 ; 3 Jo. & Lat. 397 ; *Lovat* v. *Lord Ranelagh*, 3 V. & B. 29.

(*d*) *Thompson* v. *Guyon*, 5 Sim. 65, 72.

And, however it may be in Ireland,—where the commission of waste or a breach of covenant does not appear to disentitle the tenant to specific performance of a covenant for perpetual renewal (*e*),—in England, at all events, the same strict rule would prevail whether the covenant for renewal was for a perpetual or for a limited renewal (*f*).

The rule as to costs, in cases like those just considered, used to be that, where the tenant was applying to the court for relief against his own laches or misfeasance, he had to pay the costs : but where the landlord had refused to renew on insufficient grounds, then the landlord was to pay them (*g*), and the same rule would probably still be observed.

B. Duty of ecclesiastical persons and corporations to maintain and repair fences, and on their right to cut timber for that purpose.—It is the duty of a bishop, rector, parson, vicar, or other ecclesiastical person to maintain in repair the fences of the lands held respectively by them *jure ecclesiæ*, and such persons are chargeable to their successors for a failure so to do (*h*). Moreover, the executors of such person are chargeable to his successor for dilapidations to the same extent as the person himself would have been, if living (*i*).

The executors of a deceased incumbent are, however, not liable for any digging of gravel or opening of mines

(*e*) *Mulloy* v. *Goff*, 1 Ir. Ch. Rep. 27. See also 1 Furlong, Landlord and Tenant, 265 ; Lyne on Leases, App. 110, 119.

(*f*) *Nicholson* v. *Smith*, 22 Ch. D. 640 ; *Gas Light and Coke Co.* v. *Towse*, 35 Ch. D. 519.

(*g*) *Fitzgerald* v. *Carew*, 1 Ir. Eq. Rep. 346 ; *Fitzgerald* v. *O'Connell*, 6 Ir. Eq. Rep. 455 ; 1 Jo. & Lat. 134, *S. C.* ; 1 Furlong, L. & T. 285.

(*h*) The Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 4.

Deeds of gift by spiritual persons of their goods and chattels to defeat their successors of their remedy for hedges, fences, ditches, and other inclosures being out of reparation are, as for other dilapidations, declared fraudulent and void by the statute 13 Eliz. c. 10. See also Gibson, Codex, tit. 32, c. 3, p. 752, n.

(*i*) Rogers, Eccles. Law, 346 : Gibson, Codex, 791.

by the deceased, because these are injuries which cannot be made good by the expenditure of the money recovered as damages in the action (*k*), and besides, in order to charge the executors for dilapidations there must (it has been said) be something of demolition. Also, a parson is is not obliged to put up fences where there were none before; but if he do put them up, he must, of course, keep them in repair (*l*): Thus, where land was allotted to a vicar in lieu of tithes under an Inclosure Act, which provided that the allotment should be first well and sufficiently fenced by the Inclosure Commissioners at the public charge, and should ever afterwards be repaired by the vicar and his successors, and the commissioners made the allotment and fenced it, it was held that, as the land came to the vicar in an inclosed and fenced state, he was liable to keep up the fences at his own expense, by virtue of the common law of the realm irrespectively of the provision in the Act of Parliament, just as much as if they had been the fences of the ancient glebe (*m*).

Timber, which is called the dower of the church, may be cut down by the parson for the purpose of repairing existing defects in the fences of his parsonage (*n*).

Although the freehold (soil and herbage) of the churchyard is in the parson, as distinguished from the perpetual curate of modern creation (*o*), yet, as it is the common burial place of the parishioners, the obligation of fencing it and keeping it in good order belongs to the parish (*p*),

(*k*) *Ross* v. *Adcock*, L. R. 3 C. P. 655; *Bird* v. *Relph*, 4 B. & Ad. 826; *Huntly* v. *Russell*, 13 Q. B. 572; Yool on Waste, 78.

(*l*) Gibbon on Dilap. 56; *Bird* v. *Relph*, 2 A. & E. 773; 4 N. & M. 878.

(*m*) *Bird* v. *Relph*, 2 A. & E. 773; 4 N. & M. 878.

(*n*) *Herring* v. *Dean and Chapter of St. Paul's*, 3 Swans. 510; *Duke of Marlborough* v. *St. John*, 5 De G. & S. 174.

(*o*) *Greenslade* v. *Darby*, L. R. 3 Q. B. 421.

(*p*) By canon 85, the churchwardens are to take care, that the churchyards are well and sufficiently repaired, fenced, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charges unto whom by law the same appertaineth. See also Gibson, 194; Cripps, 5th ed., 218.

and the rather, because if the churchyard be not well inclosed, the church cannot be decently kept (*q*) ; and the churchwardens have a good cause of action at common law against the owners of the lands adjoining to the churchyard who, having been used time out of mind to repair so much of the fence thereof as adjoined to their grounds, neglect to make such repairs as are wanted, and may perhaps indict them for a misdemeanor (*r*), but they may not sue in the Ecclesiastical Courts ; should they so do a prohibition will lie, because the suit is brought to charge a temporal inheritance (*s*).

For damage done to the walls, fences, etc., of the churchyard, the churchwardens may apply for an injunction to restrain the injury, and may also recover damages for the same (*t*).

BY THE CHURCH BUILDING ACT, 1819 (*u*), the commissioners appointed for executing the Act may, if they think fit, and certain consents and notices are given, alter, repair, pull down, and rebuild the walls or fences of any existing churchyard or burial-ground belonging to any parish or chapelry, and may order to be fenced off, with walls or otherwise, any additional or new burial-ground to be set out or provided under the powers of the statute (*x*). Moreover, provisions relating to the fencing off the consecrated from the unconsecrated portions of new cemeteries are contained in the Burial Acts, 1852 and 1857 (*y*).

(*q*) 2 Inst. 489.

(*r*) Cripps, Laws of the Clergy, 5th ed., 505.

(*s*) 2 Roll. Abr. 287 ; Gibson, 194 ; *R.* v. *Reynell*, 6 East, 315.

(*t*) *Marriott* v. *Tarpley*, 9 Sim. 279.

(*u*) 59 Geo. 3. c. 134.

(*x*) 59 Geo. 3, c. 134, s. 39.

(*y*) 15 & 16 Vict. c. 85, s. 30 ; 20 & 21 Vict. c. 81, s. 11.

CHAPTER VIII.

A. Boundaries between parishes.—IN GENERAL.—"The division of the county into parishes," says Blackstone, "probably took place not all at once, but by degrees; for it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by (or with reference to) those of a manor or manors,—it very seldom happening that a manor extends itself over more parishes than one, though there may be several manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, they obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which consideration accounts for the frequent intermixture of parishes with one another; for if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands,—especially if no church was then built in any lordship adjoining to those outlying parcels" (*a*).

(*a*) 1 Bl. Com. 113, 114; 1 Still. 244.

It has also been observed by a writer of authority on this subject (*b*), that the boundaries of parishes were not definitively settled until long after the foundation of churches; and the ecclesiastical districts which formerly belonged to parishes at their first institution, have been since much varied,—and in many cases abridged and narrowed,—when new churches were built.

It is to be observed also, that a district may belong to one parish for ecclesiastical purposes, and be joined to another parish for civil purposes: Thus, with respect to the district of Tranby, which lay adjacent to the two parishes of Hessle and Kirk Ella in Yorkshire, it appearing that (for a hundred years and more) the lands in Tranby had been rated to the poor and highway rates of Hessle, and that the overseers and surveyors of Hessle had always acted for Tranby as part of their district, but that the lands in Tranby from the earliest period had been titheable to Kirk Ella, and that as to all ecclesiastical matters Tranby had uniformly and immemorially been treated and reputed as part of the parish of Kirk Ella, the court considered that an usage which had existed so long ought to be supported, assuming that it could have had a legal origin (*c*).

It is a maxim or rule of the common law, that the boundaries of parishes are to be tried exclusively in the temporal courts (*d*), and this, notwithstanding that in early times the clergy insisted on trying such boundaries in their own courts, on the ground that they were purely spiritual (*e*). Therefore in the case of such a suit brought

(*b*) Selden, vol. 3, pt. 2, pp. 1121, 1122; and see *Lousley* v. *Hayward*, 1 Yo. & Jer. 586.

(*c*) *R.* v. *Watson*, L. R. 3 Q. B. 762; 9 B. & S. 219.

(*d*) Gibson, 213; 2 Chitty, G. P. 480; Burn's Ecc. Law, Prohibition.

(*e*) Rogers, Eccles. Law, 682; *Duke of Rutland* v. *Bagshawe*, 19 L. J. Q. B. 234.

The reason for the rule of the common law is stated by Lord Coke to be, that a suit to settle parish boundaries brings into question *the right to the inheritance of the lay fee* (Gibson, 213; 3 Keb. 286).

in the Ecclesiastical Courts by a rector against a layman, a prohibition will, in general, issue (*f*) ; but if, in a suit only between the parson impropriate and the vicar of the parish,—*e.g.*, where the vicar claims all the tithes in a certain vill in the parish, and the parson all the tithes in the residue of the parish, and the question between them is, whether certain land of which the vicar claims tithes is in that vill or not,—forasmuch as it is between spiritual persons only (*scilicet*, between the parson and the vicar), then, although the parson be a layman, and the parsonage impropriate a lay fee, the question of the boundaries of the vill shall nevertheless be tried in the spiritual court ; and a prohibition will not, in such case, be granted (*g*) : and although a distinction has been sometimes attempted to be drawn between the boundaries of a vill and those of a parish (*h*), it is now considered that there is no just ground for the distinction, but that the boundaries of vills are no more triable in the Ecclesiastical Courts than those of parishes,—save only when the suit is between spiritual persons only (*i*).

But if matters only properly triable at the common law arise *incidentally* in a cause, and the Ecclesiastical Courts have jurisdiction on the principal question, the courts of common law will not grant a prohibition to stay the trial. For example, if the construction of an Act of Parliament comes incidentally into question, the Ecclesiastical Courts will not be prohibited from settling such incidental question, or any other like question that is purely incidental to the suit,—unless, of course, they proceed to try the question contrary to the principles of the common law (*k*). It appears also, that where a suit more properly triable in the courts of common law is brought in the spiritual

(*f*) *Stransham* v. *Cullington*, Cro. Eliz. 228 ; *Transham's Case*, Cro. Eliz. 178.

(*g*) *Ives* v. *Wright*, 2 Roll. Abr. 312.

(*h*) *Peter* v. *Yateman*, 1 Lev. 78 ; 1 Keb. 369 ; Sid. 89, *S. C.*

(*i*) Rogers, Eccles. Law, p. 683, n.

(*k*) *Full* v. *Hutchins*, 2 Cowp. 424.

courts, a prohibition, although it will be granted before sentence is pronounced, will not be granted after sentence (*l*); for the spiritual courts had cognizance of the cause, and prohibition will not, in such case, lie after sentence, for a mere defect in the trial (*m*).

Where two parishes are separated by a road, the line dividing the parishes is presumed, in default of evidence to the contrary, to coincide with the *medium filum* of the road (*n*), just as in the case of private properties similarly separated by a highway; so, where two parishes are separated by a private river, and there is no positive evidence of the boundary line between them, it is to be presumed to coincide with the middle line of the channel (*o*).

Two parishes may become very much mixed up in their respective parochial administrations, but that will not make them one parish, even although their lands also are equally intermixed and confused (*p*); and in case of such a confusion, it is enough for the purpose of assessing a ratepayer in respect of property which is situated in the

(*l*) *Bannister* v. *Hopton*, 10 Mod. 12; Rogers, Eccles. Law, 820, n.

(*m*) *Paxton* v. *Knight*, 1 Burr. 314.

(*n*) *R.* v. *Board of Works for the Strand District*, 4 B. & S. 526, 551, in which case, COCKBURN, L.C.J., said that "in conveyances and Acts of Parliament upon which questions of law have arisen, where land was conveyed or a district constituted with specified boundaries, and one of those boundaries consisted of a highway or a river, we never find it described as the *medium filum* of the highway or river, and it is clear . . . that if language like the present had appeared in an ordinary conveyance, it would have been considered as including the land *ad medium filum viæ*. Then why should we put a different construction upon this Act of Parliament? . . . Before the passing of the Act of 30 Car. 2, the parishes of St. Martin-in-the-Fields and St. Marylebone were co-terminous, divided by a great highway now known as Oxford Street, the legal presumption being that such highway which then divided the parishes was divided *ad medium filum* between them" (citing *Berridge* v. *Ward*, 10 C. B. (N.S.) 400).

(*o*) *R.* v. *Landulph*, 1 M. & Rob. 393; *Bridgewater Trustees* v. *Bootle*, 7 B. & S. 4; L. R. 2 Q. B. 348.

(*p*) *R.* v. *Tombleson*, 27 J. P. 150.

two parishes, if the quantity in each parish is known; and the sessions are under no obligation to determine the boundaries of the two parishes, by ascertaining which close belongs to one parish and which to the other (*q*).

THE PROPER METHOD OF PRESERVING the boundaries of parishes is by perambulations (*r*). And parishioners may, in their perambulations according to the usage, justify going over any man's land, and may also abate all nuisances in their way (*s*). Nevertheless, a custom for the inhabitants of a parish to enter a particular house, which is neither upon the boundary line or in any manner wanted in the course of the perambulations, cannot be supported (*t*); nor will entries in parish books, recording the fact that the perambulations have usually taken a particular line, be evidence in support of such an alleged custom (*u*),—for the custom, being wholly unreasonable, is void as a custom.

THE EXPENSES, PROPERLY INCURRED, of parish officers of their perambulations of the parish, and of setting up and keeping in proper repair the boundary stones of the parish, provided that such perambulations do not arise more than once in every three years, are, by statute, to be allowed out of the poor rate (*x*)

B. Adjustment of boundaries.—UNDER LAND DRAINAGE ACT.—Under the Land Drainage Act, 1861 (*y*), if it happens that by virtue or in exercise of the powers given by that Act any watercourse forming a boundary line between two or more counties, hundreds, parishes, or

(*q*) *R.* v. *Woods*, E. B. & E. 481; 4 Jur. (N.S.) 1233.

(*r*) 3 Burn's Eccles. Law, 75, 111; Gibson, Cod. 213.

(*s*) *Goodday* v. *Michell*, Cro. Eliz. 441; Viner's Abr. Perambulations.

(*t*) *Taylor* v. *Devey*, 7 A. & E. 409, 416; *Ipswich Docks* v. *St. Peter's*, 7 B. & S. 310, 346.

(*u*) *Taylor* v. *Devey*, 7 A. & E. 409, 416.

(*x*) 7 & 8 Vict. c. 101, s. 60.

(*y*) 24 & 25 Vict. c. 133.

other areas defined by law is straightened, widened, or otherwise altered, so as to affect its character as a boundary line, it is provided, that notice of the circumstance shall be given to the inclosure commissioners; and upon receiving such notice, the commissioners may, if satisfied that a new boundary line may be adopted with convenience declare, with the formalities pointed out by the Act, that the watercourse, as altered, shall be wholly or partially substituted for the former boundary line,—and, in that case, the limits of the areas of which the watercourse, when unaltered, was the boundary shall be deemed to be varied accordingly; or the commissioners may, if they think proper, require the old boundaries to be retained as they existed before the alteration in the watercourse (*z*).

UNDER METROPOLITAN POOR ACT. — Boundaries of parishes may also be adjusted under the Metropolitan Poor Act, 1869 (*a*), and any adjustments under that Act for poor law purposes are to have effect also for the purposes of parliamentary elections (*b*). Where several parts of a parish are separated from one another, and it appears to the Poor Law Board that the relief to the poor in such parish can be better administered by means of a re-adjustment of such parts by incorporation with an adjoining parish or otherwise (*c*); or, where the boundaries between any two parishes are irregular or inconvenient, the vestries thereof may agree to re-adjust such boundaries, and the agreement must be submitted to and approved of by the Poor Law Board (*d*).

UNDER TITHE COMMUTATION ACTS.—With respect to private estates only, and not with respect to parishes or the like (*e*), it is provided by the Tithe Commutation Act,

(*z*) 24 & 25 Vict. c. 133, s. 62. See also 3 Edw. 7, c. 31; 57 & 58 Vict. c. 30.
(*a*) 32 & 33 Vict. c. 63.
(*b*) 48 & 49 Vict. c. 23, s. 18.
(*c*) 32 & 33 Vict. c. 63, s. 4.
(*d*) 32 & 33 Vict. c. 63, s. 22.
(*e*) *Re Ystradgunlais*, 8 Q. B. 32.

1836 (*f*), that, if there be any suit or question touching the situation or boundary of any lands, whereby the making or executing of any agreement under the provisions of the Act shall be hindered, the owners of such lands, being parties to such suit or difference, may submit the same to reference by any writing under their hands, containing an agreement that such submission shall be made a rule of court, and upon such terms of reference as the parties may agree on ; and the decision of the arbitrator named in the reference is, *for the purposes of the Act*, to be final and conclusive on all persons. The submission, however, of persons having an estate less than a fee simple or fee tail, shall not bind persons entitled in reversion, remainder, or expectancy, without the sanction of the Board of Agriculture and Fisheries (*g*), who may direct any person having an estate of inheritance in remainder, reversion, or expectancy, or who is otherwise interested in the question, to be made a party to the reference.

The Board is also empowered to hear and determine disputes relating to the situation or boundary of any lands whereby the making of any award under the Act shall be hindered (*h*) ; and the award, when made, is to be confirmed by the Board, and is binding on all parties after confirmation (*i*).

As regards parishes or other like districts, it is enacted by the Tithe Commutation Amendment Act, 1838 (*k*), that two-thirds in value of the owners of the lands in the parish or district, the tithes of which are to be commuted, *and respecting the boundaries of which any dispute or doubt shall arise*, may, by writing under their hands, request the Board to inquire into, ascertain, and settle the

(*f*) 6 & 7 Will. 4, c. 71, s. 24.

(*g*) The Board of Agriculture and Fisheries now exercises the powers of the Tithe Commissioners. 3 Edw. 7, c. 31 ; 57 & 58 Vict. c. 30. 52 & 53

(*h*) 6 & 7 Will. 4, c. 71, ss. 45, 46. See also *Girdlestone* v. *Stanley*, 3 Y. & Coll. 421.

(*i*) 6 & 7 Will. 4, c. 71, s. 52.

(*k*) 7 Will. 4 and 1 Vict. c. 69.

boundaries ; and thereupon the Board will inquire into, ascertain, and set out the boundaries of the parish or district in accordance with the procedure in that behalf appointed by the Act ; and within one month after ascertaining and setting out the boundaries, the Board is required to publish the same, by causing a description thereof in writing to be delivered to one of the churchwardens or overseers of the parish or district, the boundary of which shall be so set out, and also to one of the churchwardens or overseers of every parish or district adjacent or adjoining thereto, and to every landowner through whose lands the boundary so set out is to pass (*l*).

This Act, however, gives the Board no power to set out new boundaries, but only to ascertain and settle the old ones (*m*) ; but by the Tithe Commutation Amendment Act, 1839 (*n*), both with regard to private estates and parishes and the like,—it is enacted (*o*), that if there be any question between any parishes or townships, or between any two or more landowners, touching the boundaries of such parishes or townships, or the lands of such landowners respectively, or if such parishes or townships, or such landowners, be desirous of having such boundaries ascertained, or a *new* boundary line defined, the Board may, on the application in writing (in the case of parishes or townships), of a majority of not less than two-thirds in number and value of the landowners of such parishes or townships, or (in the case of private estates) on the application in writing of the landowners, including (in the case of copyhold lands) the lord of the manor, deal with any dispute or question concerning such boundaries, and may ascertain, set out, and define the *ancient* boundaries between such parishes or townships or the lands of such landowners respectively, or draw and define a *new* line of boundary.

(*l*) 7 Will. 4 and 1 Vict. c. 69, s. 2.

(*m*) *R.* v. *Hobson*, 19 L. J. Q. B. 262 ; *In re Dent Commutation*, 8 Q. B. 43.

(*n*) 2 & 3 Vict. c. 62.

(*o*) 2 & 3 Vict. c. 62, s. 34.

But where the boundary that is in question is also the county boundary line, these provisions do not apply (*p*), and the Board can only ascertain the *existing* boundary of a parish or district under the powers conferred upon it by the Tithe Commutation Amendment Act, 1838 (*q*).

It should be observed, however, that the award ascertaining and setting out the boundary line, is prospective only in its operation, whether the boundary line set out be the old boundary line or a new one; and therefore, in a dispute concerning a parochial settlement, where it appears that a certain house is within the boundary of a named parish, as defined by the *award* of the Board, evidence may be given that before the making of that award, and during the time the settlement was gained, the house was not in such parish, but in one adjoining (*r*).

Moreover, it was subsequently provided that the board might exercise its powers relative to the boundaries of parishes or townships, on the application in writing of two-thirds in number and value of the landowners of the parish or township, whose boundary was in question, notwithstanding the landowners of the adjoining parish or township should not join in the requisition; and the proceedings, subject to certain notices being first given, were to be as valid and binding as if the inquiry had been instituted on the application as well of the landowners of the adjoining parish or township to which the required notices should have been sent, as of the parish or township causing the inquiry to be instituted; but if a majority of two-thirds in number and value of the landowners of the adjoining parish or township objected, all further proceedings were to be stayed (*s*).

And for the purpose of defining and settling the glebe lands of any benefice, it has been enacted that, upon the

(*p*) 2 & 3 Vict. c. 62, s. 24.

(*q*) *In re Dent Commutation*, 8 Q. B. 43.

(*r*) *R.* v. *Madeley*, 15 Q. B. 43; *R.* v. *St. Mary's*, 4 B. & Ald. 464, 465.

(*s*) 3 & 4 Vict. c. 15, s. 28.

application of the spiritual person to whom, in right of such benefice, the glebe belongs, and with the consent of the landowners claiming title to the land so defined as glebe, and in possession thereof, the Board of Agriculture and Fisheries, both before and after completion of any tithe commutation, has the same powers relative to the glebe lands and for ascertaining and defining the boundaries thereof, as it has relative to the boundaries of the lands of any landowners under the provisions of the Tithe Commutation Acts, the provisions of which have been set forth above ; and it is provided, that in every such case, the Board shall make its award, in like manner as in the case of awards under the Tithe Commutation Act, 1836, setting forth the contents, description, and boundary of the glebe lands, as finally settled by it, and of the lands (if any) awarded to the landowners (*t*).

Finally, the Board of Agriculture and Fisheries may alter, vary, or change the apportionment of the commutation rentcharge in any parishes,—wherever the boundaries of the parishes shall have been set out afresh under any Inclosure Act or otherwise,—if it appear to it that the original apportionment of the rentcharge in such parishes is, by reason of such new definition of boundaries, rendered inconvenient (*u*) ; and where, from error as to boundary or otherwise, any apportioned commutation rentcharge shall have been charged on lands not within the parish which is made subject to the aggregate rentcharge, the Board is empowered to direct the redemption thereof ; and touching the situation and boundary of any lands alleged to have been improperly included in the original tithe apportionment, it is to have the same power of ascertaining and settling the situation and boundary, as it had under the Tithe Commutation Act, 1836, for making the original apportionment (*x*).

(*t*) 5 & 6 Vict. c. 54, s. 5.
(*u*) 23 & 24 Vict. c. 93, s. 16.
(*x*) 23 & 24 Vict. c. 93, ss. 12, 33.

The proceedings of the commissioners, being properly authenticated,—that is to say, office copies of the proceedings,—were (*y*), and any purported copy of any document being a copy under the seal of the Board is, made evidence of the transactions therein referred to (*z*): these provisions not affecting the question of the admissibility of the document, as evidence in any particular matter or for any particular purpose (*a*),—subject, of course, to all just exceptions or objections to their admissibility in evidence (*b*).

Any order of the Board may be removed by *certiorari* into or otherwise appealed to the King's Bench Division, —to be there quashed or otherwise dealt with (*c*).

UNDER LOCAL GOVERNMENT ACTS.—Under the Local Government Act, 1858 (*d*), it was provided that any place not having a known or defined boundary might petition one of her Majesty's principal secretaries of state to settle its boundary for the purpose of entitling the place to adopt the Act (*e*), and it was held that this power was conferred without being in any way restricted to the accustomed legal divisions of the country, such as manors, hamlets, townships, or parishes; but it was sufficient if the place had an actual known and defined boundary, or one that was physically visible and notorious, so that there could be no mistake as to the limits within which the Act was to be applied (*f*). Moreover, even a district, formed for ecclesiastical purposes only, under 6 & 7 Vict. c. 37, that consisted of parts of two townships each of which separately maintained its own poor and its

(*y*) 6 & 7 Will. 4, c. 71, s. 2. See also *Gifford* v. *Williams*, 38 L. J. Ch. 598.

(*z*) 52 & 53 Vict. c. 30.

(*a*) *Wilberforce* v. *Hearfield*, 5 Ch. D. 709.

(*b*) *Doe* d. *Molesworth* v. *Sleeman*, 9 Q. B. 298; *Wilberforce* v. *Hearfield*, 5 Ch. D. 709.

(*c*) 1 & 2 Vict. c. 69, s. 3; 2 & 3 Vict. c. 62, ss. 35, 36; and 9 & 10 Vict. c. 73, s. 21; *R.* v. *Merson*, 3 Q. B. 895.

(*d*) 21 & 22 Vict. c. 12.

(*e*) 21 & 22 Vict. c. 12, s. 16.

(*f*) *R.* v. *Local Government Board* (1873), L. R. 8 Q. B. 227.

own highways, was a place having a "known or defined boundary" within the meaning of that section of the Local Government Act, 1858 (*g*), which provided that a place having a known or defined boundary might by a resolution of the owners and ratepayers within that boundary adopt the Act (*h*).

Under the Local Government (Boundaries) Act, 1887 (*i*), special boundaries commissioners for England and Wales were appointed to inquire respecting each county as to the best method of adjusting the county boundaries and those of other local areas of local government in such a manner as to arrange that no sanitary district, borough, union, or parish should lie within the bounds of more counties than one; and as to the best method of dealing with parts of the county wholly or almost detached from it; and as to the best method of dealing with cases where a borough was not an urban sanitary district, and was wholly or partly comprised in an urban sanitary district; and as to altering boundaries, combining areas, or making administrative arrangements in relation to any alteration that might be recommended by them in the boundaries of any area of local government.

And it was also provided that financial and administrative considerations should be duly regarded by the commissioners in making their recommendations, and that they should, as soon as possible, make a report as to their proceedings to the Local Government Board, and that the report should be laid before Parliament (*k*).

Under the Local Government Act, 1888 (*l*), it was provided that every report made by the boundary commissioners under the Local Government (Boundaries) Act,

(*g*) 21 & 22 Vict. c. 12, s. 12.

(*h*) *R.* v. *The Ratepayers of Northowram* (1865), L. R. 1 Q. B. 110.

(*i*) 50 & 51 Vict. c. 61.

(*k*) **The above provisions were not applicable** where the Metropolitan Board of Works had power to levy the Metropolitan consolidated rate.

(*l*) 51 & 52 Vict. c. 41.

1887 (*m*), should be laid before the council of any administrative county or county borough affected by their report, which should be taken into consideration by the council who were to make such representations to the Local Government Board as they thought expedient for the adjustment of the boundaries of their county, and of other areas of local government partly situate in their county, with the object of securing that no such area should be situate in more than one county (*n*).

It was further provided that (*o*) when the council of any county or borough had represented to the Local Government Board that the alteration of the boundary of the county or borough was desirable; or that the union for the purposes of the Act of a county borough with a county was desirable; or that the union of any counties or boroughs, or the division of any county was desirable; or that the alteration of the boundary of any electoral division of a county, or of any area of local government partly situate in the county or borough, was desirable, the Local Government Board should, unless for special reasons it thought that the representation should not be entertained, have a local inquiry made, and might either make or refuse an order for the proposal contained in such representation: provided that in default of such representation by the council before a specified time, the Local Government Board might *ex mero motu* cause the making of such local inquiry, and thereupon might make such order as it thonght expedient, and provided also that if the order altered the boundary of a county or borough, or provided for the union of a county borough with a county, or for the union of any counties or boroughs, or for the division of any county, it should be provisional

(*m*) 50 & 51 Vict. c. 61.

(*n*) 51 & 52 Vict. c. 41, s. 53.

Under the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 36 (12)), the report must be laid also before any joint committee of county councils, and it is the duty of such joint committee to take such reports into consideration before framing any order under the powers conferred on them.

(*o*) 51 & 52 Vict. c. 41, s. 54.

only, and not effective unless confirmed by parliament. Moreover, where such an order altered a borough boundary it might, as consequential upon the alteration, increase or decrease the number of the wards in the borough and alter their boundaries (*p*).

Again, the Act provided that whenever a *primâ facie* case respecting any county district not a borough, or any parish, for a proposal to alter or define the boundary thereof, had been made out to the satisfaction of a county council, it might cause an inquiry to be made as to the desirability thereof in the locality, upon notice given therein and to the Local Government Board educational department or other interested government department; and if satisfied that the proposal was desirable, make an order therefor (*q*): so where the proposal was to divide a county district, or a parish, or unite it with another district or districts, or another parish or parishes, or to transfer part of a parish to another parish (*r*): so, where it was proposed to alter the boundaries of any ward (*s*). Notice, however, of the provisions of such order must be given and copies thereof supplied as prescribed (*t*), and otherwise at the pleasure of the council. The order, moreover, becomes effective upon its final approval by the county council when it relates to the alteration of the boundaries of a ward, but in every other

(*p*) 51 & 52 Vict. c. 41, s. 54.

Absence of Local Government Board Order for Alteration of Unions.—Part of a parish may be added by an order of a county council to an adjacent parish, and consequently become part of the poor law union in which the latter parish is situate, notwithstanding that the parishes were originally in different unions, and that the Local Government Board has not altered the boundaries of the unions (*Bootle Union* v. *Whitehaven Union*, 19 T. L. R. 453).

(*q*) 51 & 52 Vict. c. 41, s. 57 (1) (a).

(*r*) 51 & 52 Vict. c. 41, s. 57 (1) (b).

(*s*) 51 & 52 Vict. c. 41, s. 57 (4) (e).

(*t*) 51 & 52 Vict. c. 41, s. 57 (2). See also s. 71 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), providing that the order must be sent to the Local Government Board and to the Board of Agriculture. See also 3 Edw. 7, c. 31.

case it must be submitted to the Local Government Board ; who may cause a local inquiry to be made, and determine whether the order is to be confirmed or not, if within three months after notice of the provisions of the order which the Board determine to be the first notice there be a petition for the disallowance of the order : if, however, such petition be not presented, or be withdrawn after presentation, the Local Government Board must confirm the order with modifications therein if necessary. It must be observed, however, that any order that is confirmed by the Local Government Board is to be laid before Parliament, and that the powers of the Local Government Board in respect of the union or division or alteration of parishes are not diminished but increased by the foregoing section (*u*).

Where any of the areas referred to in s. 57 of the Local Government Act, 1888, is situate in two or more counties, or the alteration of any such area would alter the boundaries of a poor law union situate in two or more counties, a joint committee, appointed by the councils of those counties, shall be deemed always to have had power to make orders under that section with respect to that area ; and where, on March 5th 1894, a rural sanitary district or parish was situate in more than one county, a joint committee of the councils of those counties was to act thereunder, and if any of those councils did not, within two months after request from any other of them, appoint members of such joint committee, the members of the committee actually appointed were to act as the joint committee. Provided that any question arising as to the constitution or procedure of any such joint committee should, if the county councils concerned failed to agree, be determined by the Local Government Board (*x*).

(*u*) 51 & 52 Vict. c. 41, s. 57 (2)—(7).

Reduction of time for appealing against order.—The time for petitioning against the order is reduced from three months to six weeks after the notice referred to (56 & 57 Vict. c. 73, s. 41).

(*x*) 56 & 57 Vict. c. 73, s. 36 (11).

Under the Local Government Act, 1894 (*y*), it was provided that every county council should immediately take into consideration the cases within their county of every parish and rural sanitary district (*z*), which on March 5th, 1894, was situate partly within and partly without an administrative county, and of every parish which at that date was partly within and partly without a sanitary district, and of every rural sanitary district which had a population of less than two hundred, and of every rural sanitary district which at the above date had less than five elective guardians capable of acting and voting as members of the rural sanitary authority of the district, and of every rural parish which was co-extensive with a rural sanitary district (*a*); and whether any proposal had or had not been made as mentioned in s. 57 of the Local Government Act, 1888 (*b*), should, as soon as practicable in accordance with that section, cause inquiries to be made and notices given, and make such orders, if any, as they deemed most suitable for carrying the Act into effect in accordance with the following provisions, namely:

That the whole of each parish and, unless the county council for special reasons otherwise directed, the whole of each rural district should be within the same administrative county; and that the whole of each parish should, unless the county council for special reasons otherwise directed, be within the same county district (*c*).

It was further provided (*d*) that, where a parish was at the passing of the Act situate in more than one urban district, the parts of the parish in each such district should,

(*y*) 56 & 57 Vict. c. 73.

(*z*) **Rural sanitary districts** consist of the area of any union not co-incident in area with an urban district, or wholly included in an urban district with the exception of those portions of the area that are included in an urban district (38 & 39 Vict. c. 55, s. 9).

(*a*) 56 & 57 Vict. c. 73, s. 36 (1).

(*b*) 51 & 52 Vict. c. 41. *Vide supra*, p. 170.

(*c*) 56 & 57 Vict. c. 73, s. 36 (1) (i.).

(*d*) 56 & 57 Vict. c. 73, s. 36 (2).

from a named day, unless otherwise directed, and subject to any alteration of area made in pursuance of any Act, be separate parishes, in like manner as if they had been constituted separate parishes under the Divided Parishes and Poor Law Amendment Act, 1876, and the Acts amending the same (*e*).

Again, it was provided (*f*), that where an alteration of the boundary of a county or borough seems expedient for any of the foregoing purposes, application should be made to the Local Government Board for an order under s. 54 of the Local Government Act, 1888 (*g*).

And where the alteration of a poor law union seems expedient by reason of the Act, the county council may, by order, provide for such alteration in accordance with s. 58 of the Local Government Act, 1888, or otherwise, provided that the powers of the Local Government Board with respect to the alterations of unions be not affected (*h*).

It was further provided (*i*) that, where an order for the alteration of a boundary of any parish or division thereof, or the union thereof or of any part thereof with another parish, was proposed to be made after a named day, notice thereof should, a reasonable time before the making of the order, be given to the parish council of the parish, or if there was no parish council, to the parish meeting, either of which, as the case might be, should have the right to appear at any inquiry held by the

(*e*) **Divided parishes.**—39 & 40 Vict. c. 61, which empowered the Local Government Board, whenever any parish was divided so as to have its parts or any of them isolated in some parish or otherwise detached, to make an order, after local inquiry to be held after notice thereof given, either for constituting separate parishes out of the divided parish, or for amalgamating some of the parts thereof with the parish or parishes in which they might be included, or to which they might be annexed, and providing, if necessary, for a change of the county of the parish or of a part thereof. See also 45 & 46 Vict. c. 58.

(*f*) 56 & 57 Vict. c. 73, s. 36 (5).

(*g*) *Vide supra*, p. 169.

(*h*) 56 & 57 Vict. c. 73, s. 36 (6).

(*i*) 56 & 57 Vict. c. 73, s. 36 (7).

county council with reference to the order, and should be at liberty to petition the Local Government Board against the confirmation of the order. So it was provided (*k*) that, where the alteration of a boundary of any parish, or the division thereof or the union thereof, or of part thereof with another parish, seemed expedient for any of the purposes of the Act, provision for such alteration, division or union might be made by an order of the county council, confirmed by the Local Government Board, under s. 57 of the Local Government Act, 1888 (*l*).

Moreover, any order made by a county council with respect to areas and boundaries under the Act, shall be deemed to be an order under s. 57 of the Local Government Act, 1888, and any board of guardians affected by an order shall have the same right of petitioning against that order as is given by that section or by any other authority (*m*).

UNDER INCLOSURE ACTS.—By the General Inclosure Act, 1845 (*n*), in case the valuer acting in the matter of any inclosure represents to the commissioners that the boundaries of any parish or manor, in which the land proposed to be inclosed, or any part thereof, is situate, and of any parish or manor adjoining thereto, are not then sufficiently ascertained and distinguished, the commissioners, after giving certain prescribed notices for the protection of the rights of all persons interested in the question, may ascertain, set out, and fix the boundaries of such parishes and manors respectively ; but any person interested in the determination of the commissioners may have the matter determined by a jury, or may apply to the King's Bench Division to remove the matter into

(*k*) 56 & 57 Vict. c. 73, s. 36 (8).

(*l*) *Vide supra*, p. 170.

(*m*) 56 & 57 Vict. c. 73, s. 36 (10).

(*n*) 8 & 9 Vict. c. 118. The powers of the commissioners are now exercised by the Board of Agriculture and Fisheries under 52 & 53 Vict. c. 30 ; 3 Edw. 7, c. 31.

that court by *certiorari*; and in the case of any such application, the decision or finding of the jury or of the court is conclusive as to the boundaries of the parish or manor (*o*). Also, by the Inclosure Act, 1849 (*p*), all the provisions of the General Inclosure Act, 1845, and of certain other specified Acts, applicable to the ascertaining, setting out, and fixing the boundaries of any parish or manor, in which the land proposed to be inclosed, or any part thereof, is situate, and of any parish or manor adjoining thereto, are extended and made applicable to the ascertaining, setting out, and fixing of the boundaries of any township, vill, hamlet, or tithing not having separate overseers of the poor,—and of a manor, although the same shall not abut or adjoin upon any other manor (*q*).

In the inclosure proceedings, it is provided that, where no dispute is pending as to the parish in which the lands are situate, the valuer may, with the approbation of the commissioners, declare in his award how much and which part of any of the lands to be allotted, divided, or dealt with by his award, or of any roads passing over or through the same, shall be considered in the parish or parishes in which any of them are situate; but his award must be confirmed by the commissioners; and, where the boundaries of any counties are to be affected by the award, the commissioners are not to confirm it, unless and until notice has been given to the clerks of the peace for the respective counties; and on receiving such notice, the respective counties may, by their clerks, object to the award in the manner mentioned in the Act; and, in that case, the award, so far as it respects the boundaries of the counties, is not to be confirmed by the commissioners (*r*).

(*o*) 8 & 9 Vict. c. 118, s. 39. See also 15 & 16 Vict. c. 79, ss. 25, 26; *R.* v. *Washburne*, 4 B. & C. 732; *R.* v. *Lancashire*, 1 B. & Ald. 630.

(*p*) 12 & 13 Vict. c. 83.

(*q*) 12 & 13 Vict. c. 83, s. 9. See also 15 & 16 Vict. c. 79, s. 28.

(*r*) 12 & 13 Vict. c. 83, s. 1.

By the Inclosure Act, 1840, power is given to the commissioners to straighten the boundaries of any parish, manor, hamlet, or district to be divided and inclosed, whenever the lands of such parish, manor, hamlet, or district shall be, or be reputed to be, intermixed with the lands of any other parish, manor, hamlet, or district (*s*).

A parish boundary decision of the inclosure commissioners acting under the provisions of the Inclosure Acts may be (and often is) only a determination as to the boundaries of the parish *for the future;* and in such case it is, of course, no evidence of what the ancient boundaries of the parish were. Nor will such a determination, being wholly *alio intuitu*, prejudicially affect the *private* rights of individual proprietors (*t*),—and, in fact, the particular Inclosure Act usually contains an express clause saving this possible prejudice. Again, where it was provided, as regards improved waste lands lying in one or other of two or more parishes, that the occupier of the houses, mines, etc., on or within or under such improved wastes, should be assessed or rated to the relief of the poor of the parish which lay nearest to the improved lands, and that any disputes arising out of the assessment might be settled by the justices of the peace, it was at the same time provided, that nothing in the Act should determine the boundary of any parish or place, otherwise than for the purpose of such assessment (*u*) ; and these principles may be said to be of universal application, unless the Act expresses to the contrary, or the specific purposes of the Act necessarily demand a construction to the contrary.

UNDER HIGHWAY ACTS.—By the General Highway Act, 1835, where boundaries of parishes pass across or through the middle of a common highway, the justices, at a special sessions for the highways, on complaint made by the surveyor of any parish, in the form and in the manner

(*s*) 3 & 4 Vict. c. 31, s. 2.
(*t*) *R.* v. *Inhabitants of St. Mary's*, 4 B. & Ald. 462.
(*u*) 17 Geo. 2, c. 37.

specified in the Act, may summon the surveyor of any other parish adjoining to and bounding on such common highway to appear before them ; and after hearing both parties and their witnesses, the justices are to divide the whole of the highway, by a transverse line across it, into equal parts,—or else into such unequal parts and proportions as, upon a consideration of the soil, waters, floods, and inequality of the highway, or any other circumstances attending the same, the justices shall in their discretion think just and right ; and they are to determine which of such parts or divisions shall be repaired by each of the respective parishes (*x*) ; and the order of the justices, which is conclusive (*y*), together with a plan of the highway and of the aforesaid division thereof, is to be filed with the clerk of the peace of the county in which the highway lies (*z*). Moreover, posts, stones, and other boundaries are to be put up for the better ascertaining the aforesaid division and allotment.

Nothing in the Act, however, is to extend to affect or alter in any manner whatsoever any boundaries of counties, lordships, hundreds, manors, or any other divisions of public or private property,—*or the boundaries of any parishes or townships*,—otherwise than for the purpose of amending and keeping in repair the particular portions of the highway (*a*).

UNDER TURNPIKE ACTS.—Similar provisions for apportioning the repairs and maintenance of certain highways within London or the metropolitan area,—being highways which run between adjoining parishes,—are contained in the Metropolis Turnpike Roads Acts Amendment Act, 1863 (*b*) ; but in order to give the justices jurisdiction thereunder, the existence of a boundary on the highway

(*x*) 5 & 6 Will. 4, c. 50, s. 38.
(*y*) *R.* v. *Hickling*, 7 Q. B. 880 ; 14 L. J. M. C. 177.
(*z*) *R.* v. *Washbrook*, 4 B. & C. 732.
(*a*) 5 & 6 Will. 4, c. 50, s. 61.
(*b*) 26 & 27 Vict. c. 78, s. 4.

to be divided is a condition precedent ; and the decision of the justices will be quashed if no such boundary in fact exists (*c*).

The Turnpike Road Act, 1823 (*d*), provides for the marking of the parish boundaries with stones in the turnpike, where these boundaries cross the turnpike.

BOUNDARIES OF ARCHDEACONRIES, ETC.—Powers for re-arranging the boundaries of archdeaconries and rural deaneries are conferred upon the ecclesiastical commissioners by the Archdeaconries and Rural Deaneries Act, 1874 (*e*).

(*c*) *R.* v. *Perkins*, 14 Q. B. 229 ; 14 Jur. 362 ; 19 L. J. M. C. 105.

(*d*) 3 Geo. 4, c. 126, s. 119.

(*e*) 37 & 38 Vict. c. 63, *extending* their powers under 6 & 7 Will. 4, c. 77, and 3 & 4 Vict. c. 113.

CHAPTER IX.

A. Highways, turnpike roads, and private roads.—In General.—Where a highway passes through inclosed land the whole space from fence to fence is the highway (*a*), although it may be of a varying and unequal width (*b*) and not the formed road merely, whether of pavement, gravel, or other material; and, where a highway passes over a common, it frequently extends considerably to the right and left of the formed or ordinary roadway or passage (*c*). It appears to be settled, however, that the fences themselves are not generally comprehended in the legal acceptation of a highway (*d*).

(*a*) *Pullin* v. *Reffell*, W. N. (1891) 39.

(*b*) *Harvey* v. *District of Truro*, 19 T. L. R. 576. Compare *Neeld* v. *Hendon Urban District Council*, 81 L. T. 406; *Belmore* v. *Kent County Council*, [1901] 1 Ch. 873.

(*c*) *Elwood* v. *Bullock*, 6 Q. B. 383, 409; 13 L. J. Q. B. 330; 8 Jur. 1044.

(*d*) *R.* v. *Llandilo*, 2 T. R. 232; *R.* v. *United Kingdom Telegraph Co.*, 31 L. J. M. C. 166; 3 F. & F. 73; 9 Cox C. C. 174; 8 Jur. (N.S.) 1153; 6 L. T. 378; 10 W. R. 538; *R.* v. *Wright*, 3 B. & Ad. 681.

OWNERSHIP AND REPAIRS OF.—Where the road forms the boundary between two estates,—whether freehold, copyhold, or leasehold, the *primâ facie* presumption is, that the soil of the road (with the minerals under it) *usque ad medium filum viæ*, and the waste lands and trees by the sides thereof, belong to the adjoining owners (*e*). Which presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based on the supposition that, when the road was originally formed, the proprietors on either side contributed each a portion of his own land for the purpose (*f*),—there being no presumption that a highway was made before the time of legal memory, so as to vest the soil of it in the lord of the manor (*g*). Consequently, a conveyance of land described as abutting on a road passes a moiety of the soil of the road, unless there be something in the context to exclude that construction (*h*); and admeasurements of the land, even when accompanied by a reference to a coloured plan in which no part of the road is included, have been held insufficient to rebut the presumption that a moiety of the road was intended to be conveyed (*i*).

Moreover, the same principles which apply to boundaries on a public road apply also to those on a private road; and if, therefore, the estates of two proprietors are separated by a lane or private way, the estate of each is presumed to extend *usque ad medium filum viæ*,—unless, of course, there is evidence showing another line of

(*e*) *Doe* v. *Pearsey*, 7 B. & C. 304; 9 D. & R. 908; *Goodtitle* v. *Alker*, 1 Burr. 133; *Stevens* v. *Whistler*, 11 East, 51; *R.* v. *Matthias*, 2 F. & F. 570; 2 Jur. 13.

(*f*) *Holmes* v. *Bellingham*, 29 L. J. C. B. 132; 7 C. B. (N.S.) 329.

(*g*) *Doe* v. *Pearsey*, 7 B. & C. 304; 9 D. & R. 908; *Cooke* v. *Green*, 11 Price, 736; *Scoones* v. *Morrell*, 1 Beav. 251.

(*h*) 2 Washburn, R. P. 627. *Vide supra*, p. 5.

(*i*) *Simpson* v. *Dendy*, 8 C. B. (N.S.) 433; *Berridge* v. *Ward*, 10 C. B. (N.S.) 400; 30 L. J. C. P. 218; *Salisbury* v. *Great Northern Rail. Co.*, 5 C. B. (N.S.) 174. *Vide supra*, p. 6.

division (*k*) ; but the mere fact that a private road leads to the lands of one only of the two adjoining proprietors will not *per se* be sufficient to rebut the presumption of law, for it is no evidence that the soil of the road is vested in the proprietor to whose land it exclusively leads (*l*).

The presumption, however, was held rebutted by the following combination of circumstances, any one of which standing alone would possibly not have sufficed, that is to say: (1) the land conveyed adjoining the highway was distinguished on the plan by a distinct number, and the highway had also its own distinct number ; (2) there were trees on the land conveyed, and also trees on the highway, and the valuation of the timber extended only to the trees on the land, and not to the trees on the highway ; and (3) the acreage and the colouring on the plan excluded the highway (*m*).

It has been said, also, that the presumption, that waste lands adjoining a public highway and the soil of the highway itself *ad medium filum viæ*, belong to the adjoining owners, does not apply to persons claiming under the same grantor, in the event of the true title appearing, which it will usually do where the adjoining properties have both been derived from one and the same original owner ; therefore, where the lord of a manor has conveyed land to one, and afterwards other land to another, if it appears, that a narrow strip of land passes by one or other of the conveyances, but it is doubtful by which, no presumption in favour of the former as against the latter arises from the fact that the strip of ground lies between a highway and land indisputably in the former's conveyance (*n*).

(*k*) *Holmes* v. *Bellingham*, 29 L. J. C. B. 132 ; *Noye* v. *Reed*, 1 M. & Ry. 65.

(*l*) *Smith* v. *Howden*, 14 C. B. (N.S.) 398.

(*m*) *Pryor* v. *Petre*, [1894] 2 Ch. 11. See also *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263 ; *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133.

(*n*) *White* v. *Hill*, 6 Q. B. 487 ; *Salisbury* v. *Great Northern Rail. Co.*, 5 C. B. (N.S.) 174.

And, generally, the presumption may be rebutted by evidence showing conclusively that the ownership of the soil of the highway or of the waste lands is in the lord of the manor, or in some other proprietors, the point to be ascertained, in all cases, being whether the grantee of the lord inclosed to the edge of his grant, or left an intervening space between his inclosure and the boundary line of his property: for if he inclosed to less than the whole extent of his grant, leaving a space next to the road, that intervening space will belong to him, but, if he inclosed to the full extent of his grant, the intervening space will belong to the lord. The presumption, however, being *primâ facie* in favour of the grantee of the adjoining land, the lord must show acts of ownership to support his claim if he claims the intervening space (*o*), and in support of his title and claim he may give evidence not only of acts of ownership exercised over the intervening space or spot in dispute, but also of acts of ownership exercised over other parts of the waste lands of the manor, provided that these other parts shall be situated relatively to the intervening space or plot in dispute in such manner as that they and it can fairly be considered parts of the same waste or common (*p*); but evidence of user by the grantee and by those claiming under him will be allowed to outweigh the presumption in favour of the lord which arises from acts of ownership by the lord on other parts of the wastes of the manor (*q*).

(*o*) *Doe* d. *Barrett* v. *Kemp*, 7 Bing. 332; *Tutill* v. *West Ham Local Board*, L. R. 8 C. P. 447.

(*p*) *Doe* v. *Kemp*, 2 Bing. N. C. 102; *Headlam* v. *Hedley*, Holt N. P. 463; *Anon.*, Lofft, 358; *Doe* v. *Hampson*, 4 C. B. 267; *Stanley* v. *White*, 14 East, 332; *Tyrrwhitt* v. *Wynne*, 2 B. & A. 554; *Hollis* v. *Goldfinch*, 1 B. & C. 205; *Grose* v. *West*, 7 Taunt. 39; *Wild* v. *Holt*, 9 M. & W. 672; *Taylor* v. *Parry*, 1 M. & Gr. 605; *Vaughan* v. *De Winton*, 15 W. R. 1145; *Tutill* v. *West Ham Local Board*, L. R. 8 C. P. 447; *Clark* v. *Elphinstone*, 6 App. Cas. 164.

(*q*) *Simpson* v. *Dendy*, 8 C. B. (N.S.) 433; *Gery* v. *Redman*, 1 Q. B. D. 161. See also *Plumbley* v. *Lock*, 19 T. L. R. 14.

It may happen that the soil of the highway is not vested either in the lord of the manor as such or in the adjoining landowners ; *e.g.*, where the pasturage and soil of the highway are vested in the churchwardens and overseers of the parish as trustees upon trust for the parish, and a lawful origin for such a title will be presumed where the parish trustees have for a great many years let the pasturage beside the road,—and, failing any other legal title, the Statute of Limitations will confer a title (*r*).

As regards strips of land occasionally found to lie between the lands of private proprietors and commonly called *balks*, there is no presumption of law, in favour of either proprietor, as against the other, being the owner thereof (*s*), and the title thereto must accordingly be shown when either of them claims the balk ; and, in general, balks do not, in English law, belong to the public, as did the *methoria* of the civil law (*t*).

Regarding strips of waste land beside high roads it has been said that in ancient times roads made through uninclosed lands were not formed with that exactness which the exigencies of society now require ; and the public were entitled to pass along the land by the side of the road, when the latter was out of repair, and if the landowner excluded the public from using the adjoining land, he cast upon himself the onus of repairing the road, even if it were the duty of the parish so to do ; and that in such case, if the same person was the owner of the land on both sides, and inclosed on both sides, he was bound to repair the whole of the road ; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road ; and where there was an ancient inclosure on one side, and the landowner inclosed on the other, he became bound to repair the whole ; so that it followed that when a person inclosed his land from the

(*r*) *Haigh* v. *West*, [1893] 2 Q. B. 19.
(*s*) *Godmanchester* v. *Phillips*, 4 A. & E. 560.
(*t*) Colquhoun's Summary, s. 2179.

road, he would not make his fence close thereto, but would leave an open space at the side of the road, to be used by the public when occasion required, the object being to leave a sufficiency of land by the side of the road when it was out of repair (*u*).

This further consequence also appears to follow, namely, that, where a person inclosing his land up to a highway so as to deprive the public of their right of travelling on the adjoining strips of waste land when the road itself is not fit for use, neglects to keep the road in repair, those lawfully using the highway may make gaps in the hedges and pass along on his inclosure, so long as they do not ride further into it than is needful for avoiding the bad way (*x*).

These principles, however, do not apply in the case of a private road, either because the person using the way ought himself to keep it in repair (*y*), or because the grantor of the way gives the grantee a right over a particular line of road only, and no liberty to break out of it over the whole surface of his close (*z*).

Moreover, an owner whose land adjoins an inclosure made by virtue of a special Act of Parliament for inclosing and dividing common fields, will not, unless so directed by the Act, be liable either to make or to keep in repair the road skirting or crossing his inclosure (*a*).

(*u*) *Steel* v. *Prickett*, 2 Stark. 463, 469. See also *R.* v. *Stoughton*, 1 Sid. 464 ; *Selby* v. *Nettlefold*, L. R. 9 Ch. 111 ; 22 W. R. 142 ; 43 L. J. Ch. 359 ; 29 L. T. (N.S.) 661 ; *Harvey* v. *District Council of Truro*, 19 T. L. R. 577.

(*x*) *Hemm's Case*, Sir W. Jones, 297 ; *Duncombe's Case*, 1 Rolle, Abr. 390 ; Cro. Car. 366 ; 2 Ld. Raym. 1170.

(*y*) *Taylor* v. *Whitehead*, 2 Doug. 749.

(*z*) *Taylor* v. *Whitehead*, *supra* ; *Bullard* v. *Harrison*, 4 M. & S. 387 ; *Absor* v. *French*, 2 Shower, 28 ; Styles, 364 ; *Arnold* v. *Holbrook*, L. R. 8 Q. B. 96 ; *Mercer* v. *Woodgate*, L. R. 5 Q. B. 26 ; *Arnold* v. *Blake*, L. R. 6 Q. B. 433 ; *St. Mary, Newington* v. *Jacobs*, L. R. 7 Q. B. 47.

(*a*) *R.* v. *Flecknow*, 1 Burr. 461 ; *Ex parte Vernor*, 3 Atk. 772 ; *R.* v. *Ramsden*, E. B. & E. 949, 957.

Again, an adjoining owner will not be liable for inclosing up to a modern highway, where, from the circumstances of the origin of the road and the nature of the property, the dedication of the land for a road and public highway may reasonably be presumed to have been to the extent of the road only as laid out, excluding any right to go on the land adjoining; and this is more especially so, where streets and roads are laid out over building land (*b*).

A landowner who is bound in respect of his inclosure to repair a highway, is freed from his liability in the event of his laying open the inclosure as it was before (*c*); and on the other hand, if, under the provisions of the Highway Acts, the highway is widened, turned, or diverted, he will become liable to contribute towards the repairs of the new road (*d*).

By the Highway Act, 1835 (*e*), the surveyor is empowered, whilst the highway is being widened or repaired, to make a temporary road through the adjoining grounds; and compensation is, in such case, to be allowed to the parties injured. Again, no person, through whose land a highway which is repaired by the parish passes, is to become liable for the repair of such highway by reason merely of his erecting fences between the highway and the adjoining land, provided the fences are erected with the consent in writing of the highway board of the district within which the highway is situate, or with the consent of the surveyor or other authority having jurisdiction over the highway (*f*).

(*b*) *R.* v. *Ramsden*, E. B. & E. 949, 957; *Beckett* v. *Corporation of Leeds*, L. R. 7 Ch. 421; and *Leigh* v. *Jack*, 5 Exch. D. 264.

(*c*) Hawkins, P. C. bk. 1, c. 76, § 7; *R.* v. *Skinner*, 5 Esp. 219; 2 Wms. Saund. 160 a; Bacon's Abr. Highways, E.

(*d*) 5 & 6 Will. 4, c. 50, ss. 92, 93.

(*e*) 5 & 6 Will. 4, c. 50, s. 25.

(*f*) 25 & 26 Vict. c. 61, s. 46.

The parish or some defined district is *primâ facie* liable for the repairs of the highways within it (*g*) ; but it may show an exemption from such liability (*h*).

By the Local Government Act, 1888 (*i*), every main road within a county, if repairable by the highway authority, became repairable by the county council,—the council having for this purpose all the powers and being subject to all the liabilities of the highway board ; but an urban authority might have retained its main roads within its own power, in which case it received from the council a contribution towards the repairs of those roads (*k*). All main roads, however, not so retained by the urban authority, vested in the county council, which has all the powers of a highway board for preventing and removing obstructions on the road, and for asserting not any right of ownership in (*l*), but the right of the public to the use and enjoyment of, the road-side wastes (*m*) : but it is specially provided that these provisions or any of them shall not alter the liability of any person or body of persons corporate or unincorporate (not being a highway authority) to maintain and repair any road or part of a road (*n*). Moreover, any rural district council is now the highway authority of the district and

(*g*) *R.* v. *Ecclesfield*, 1 B. & A. 359 ; *R.* v. *Rollett*, L. R. 10 Q. B. 469 ; *Hirst* v. *Halifax Local Board*, L. R. 6 Q. B. 181.

(*h*) *R.* v. *Barnoldswick*, 4 Q. B. 499 ; *Freeman* v. *Read*, 4 B. & S. 174 ; 32 L. J, M. C. 226 ; *Dawson* v. *Willoughby-cum-Sloothby*, 5 B. & S. 920 ; 34 L. J. M. C. 37.

(*i*) 51 & 52 Vict. c. 41. See also 56 & 57 Vict. c. 73, s. 25.

(*k*) 51 & 52 Vict, c. 41, s. 11. See also *Godstone and Caterham Arbitration*, 19 T. L. R. 290.

(*l*) *Curtis* v. *Kesteven Local Board*, 45 Ch. D. 504. Where a road is only vested in a council under s. 149 of the Public Health Act, 1875, the council has not a fee simple in the soil of the road (*Finchley Electric Light Co.* v. *Finchley Urban District Council*, 19 T. L. R. 238).

(*m*) **A highway authority cannot consent effectually** to the obstruction of or encroachment upon any part of the highway (*Harvey* v. *District Council of Truro*, 19 T. L. R. 576 ; *R.* v. *United Kingdom Electric Telegraph Co.*, 6 L. T. 378).

(*n*) 51 & 52 Vict. c. 41, s. 97.

must protect all public rights of way, and prevent as far as possible, the stopping or obstruction of any such right of way, whether within its district or in an adjoining district in the county or counties in which the district is situate, where the stoppage or obstruction thereof would, in their opinion, be prejudicial to the interests of their district (*o*) ; and must prevent any unlawful encroachment on any roadside waste within their district (*p*).

The liability to repair a highway by reason of *inclosure*, and which is called the liability *ratione clausulæ*, is on the *occupier* and not on the owner of the estate (*q*) ; but the *owner* may be liable *ratione tenuræ*, in which latter case, he may, by grant or prescription, exact a *toll traverse* from all persons using the road (*r*). But the liability *ratione tenuræ*, when it exists, is only enforceable against the owner where he is also the *occupier* of the lands liable (*s*) ; moreover, the liability will be wholly discharged by a material alteration of the character or quality of the road (*t*).

(*o*) 56 & 57 Vict. c. 73, ss. 25, 26.

(*p*) **Removal of obstructions and expenses of so doing.**—An urban district council may remove encroachments without a preliminary conviction, for the roads are vested in them by s. 149 of the Public Health Act, 1875, and the alternative procedure given them by that section or under the Highway Acts, does not deprive them of their power of summary removal (*Reynolds* v. *Presteign Urban District Council*, 65 L. J. Q. B. 400).

A district council may recover the expenses of removing an obstruction in an action against the obstructor (*Louth District Council* v. *West*, 65 L. J. Q. B. 535).

(*q*) *R.* v. *Ramsden*, E. B. & E. 949 ; *R.* v. *Hatfield*, 4 B. & Ald. 83 ; *Baker* v. *Greenhill*, 3 A. & E. (N.S.) 148 ; 2 G. & D. 435 ; 1 Wms. Saund. Rep. 158 n. (*q*).

(*r*) 3 Steph. Black., 14th ed., p. 53.

(*s*) *R.* v. *Barker*, 25 Q. B. D. 213.

Exemption from payment of highway rates.—The liability to repair a highway *ratione tenuræ*, does not, of itself, found and give rise to an exemption from the payment of highway rates (*Ferrand* v. *Bingley District Council*, 19 T. L. R. 592).

(*t*) *R.* v. *Barker*, 25 Q. B. D. 213 ; *Heath* v. *Weaverham Township*, [1894] 2 Q. B. 108.

Moreover, where a highway repairable *ratione tenuræ*, appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails to place it in proper repair when requested so to do by a district council, such council itself may place the highway in proper repair and recover from the person liable to repair the highway the necessary expenses of so doing (*u*).

This remedy, however, is available only against the occupier of the land chargeable with the obligation, the owner of such land not being liable to repay sums so expended, the public not being in any way concerned with a possible right of an occupier to be reimbursed sums he has expended in repairs (*x*).

And with reference to encroachments on the common or on waste lands, it is provided that all encroachments and inclosures,—other than inclosures authorised by the custom of the manor or otherwise according to law,—which have been made upon the land proposed to be inclosed within twenty years before the time appointed by the Act,—whether any acknowledgment shall have been made in respect of the same or not,—are to be deemed parcel of the land subject to be inclosed, and are to be divided, allotted, and inclosed accordingly ; but the rights and interests of the persons in possession of such encroachments are, if the commissioners see fit, to be taken into consideration ; and when any of such persons are turned out of their possession, they may within two calendar months after notice by the valuer, take down buildings, fences, and other erections, and convert the materials thereof to their own use (*y*). School-houses, however,

(*u*) 56 & 57 Vict. c. 73, s. 25 (2).

(*x*) *Cuckfield District Council* v. *Goring*, [1898] 1 Q. B. 865 ; 67 L. J. Q. B. 539. See also *Baker* v. *Greenhill*, 3 Q. B. 148.

The legal origin of an obligation to repair ratione tenuræ, may be a grant from the Crown (*Dittons Urban Council* v. *Marks*, 71 L. J. K. B. 309).

(*y*) 8 & 9 Vict. c. 118, s. 50.

and other erections for charitable or parochial purposes are not generally to be deemed encroachments, but, if erected within twenty years before the time fixed by the Act, may, at the discretion of the commissioners, be deemed parcel of the land subject to be inclosed (*z*). Moreover, encroachments of full twenty years' standing or upwards are to be deemed ancient inclosures, and protected accordingly,—excepting that they are not to be entitled to any right of common or to any compensation in respect thereof (*a*); and these encroachments are not to be affected by any award of the commissioners (*b*).

B. Provisions of Highway Acts as to maintenance and repair of highways, and as to hedges and fences along same, encroachments thereon, and preservation of the boundaries thereof. — As regards the width of the highway and the maintenance thereof free and clear from obstructions, the General Highway Act, 1835 (*c*), relating to boundaries and fences, provides that where by the Act any matter or thing is directed or forbidden to be done within a certain distance of the centre of the highway, the highway shall be taken to be that portion of ground which has been maintained by the surveyor as highway, and repaired with stones or other materials used in forming highways, for the six months immediately preceding; and the centre or middle of the highway is where, a line being drawn along or a point marked on the highway, an equal number of feet of highway, which have been so maintained and repaired as aforesaid for twelve months before, shall be found on each side of such line or mark (*d*). It is also provided that no tree, shrub, or bush may be planted on any carriage-way or cart-way, or within fifteen feet from the centre thereof,

(*z*) 8 & 9 Vict. c. 118, s. 51.
(*a*) 8 & 9 Vict. c. 118, s. 52.
(*b*) 10 & 11 Vict. c. 111, s. 3.
(*c*) 5 & 6 Will. 4, c. 50.
(*d*) 5 & 6 Will. 4, c. 50, s. 63.

and if planted within that distance may be compulsorily removed (*e*). Again, if the surveyor thinks any carriage-way or cart-way is prejudiced by the shade of any hedges, or by any trees, except trees planted for ornament or shelter (*f*), growing in or near hedges or other fences, or if any obstruction is caused in any carriage-way or cart-way by any hedge or tree, the occupier (*g*) of the land on which such hedges or trees are growing may be summoned before the justices at the special sessions for the highways, and the justices may order the trees to be cut, pruned, or lopped in a lateral direction (*h*), and the obstruction removed; and in case of disobedience, the defaulter incurs a penalty; and the surveyor is thereupon required to cut the trees and to remove the obstruction, the expenses incurred and penalties imposed being made recoverable as in the Act directed (*i*). Moreover, any person encroaching by making or causing to be made any building, hedge, ditch, or other fence, on any carriage-way or cart-way, within the distance of fifteen feet from the centre, shall forfeit, on conviction, for every offence any sum not exceeding forty shillings; and the surveyor is to cause the said building, hedge, ditch, or fence to be taken down or filled up at the expense of the person to whom it shall belong (*k*); and the justices at sessions, upon proof to them made upon oath, may levy as well the expense of taking down the said building, hedge, or fence, or filling up the ditch, as the several and respective penalties imposed by the Act, by distress and sale of the offender's goods as therein mentioned (*l*). It, however, has been held that the

(*e*) 5 & 6 Will. 4, c. 50, s. 64. See also *Lowen* v. *Kay*, 4 B. & C. 3.

(*f*) 5 & 6 Will. 4, c. 50, s. 65; *Frampton* v. *Tiffin*, 2 Jur. 986.

(*g*) *Woodard* v. *Billericay Highway Board*, 11 Ch. D. 214.

(*h*) The tops of the trees must not be cut off (*Unwin* v. *Hanson*, [1891] 2 Q. B. 115.

(*i*) *Jenney* v. *Brook*, 6 Q. B. 323; *Brook* v. *Jenney*, 2 Q. B. 265; *Walker* v. *Horner*, 1 Q. B. D. 4; *Woodard* v. *Billericay Highway Board*, 11 Ch. D. 214.

(*k*) *Cooper* v. *Wandsworth*, 14 C. B. (N.S.) 180.

(*l*) 5 & 6 Will. 4, c. 50, s. 69.

encroachment must be *on*, and also *within* fifteen feet from the centre of, the road: Thus, where the road is only nine feet wide, and a fence, which is erected on some waste land, is within fifteen feet of the centre of the road, but not *on* it, the surveyor has no right to pull it down (*m*) ; and it has also been held (*n*) that the highway must be a highway which has been repaired with stones, etc., for six months immediately preceding. But it has been provided by a more modern Act (*o*), that persons making encroachments on highways shall be subject to the penalties mentioned in the General Highway Act, 1835 (*p*), although the whole space of fifteen feet from the centre of the carriage-way or cart-way has not been maintained with stones or other materials used in forming highways (*q*) ; and further, that where any carriage-way or cart-way is fenced on both sides, no encroachment as aforesaid shall be allowed, whereby such carriage-way or cart-way shall be reduced in width to less than thirty feet between the fences on both sides (*r*). And here it should be mentioned, that the common notion that the owners of land on the sides of a highway may encroach or inclose up to within fifteen feet of the centre of the road, is an error ; for, if an encroachment be made upon a highway, although not within fifteen feet of the centre and although upon a part not commonly used by the public, the person making the encroachment may be indicted for a nuisance (*s*).

As regards the maintenance and repair of the highway, the General Highway Act provides, that the surveyor

(*m*) *Evans* v. *Oakley*, 1 C. & K. 125. See also *Field* v. *Thorne*, 20 L. T. (N.S.) 563 ; *Lowen* v. *Kaye*, 4 B. & C. 3 ; *Keane* v. *Reynolds*, 2 E. & B. 748 ; 18 Jur. 242 ; *R.* v. *Lepille*, 15 W. R. 45.

(*n*) *Chapman* v. *Robinson*, 1 E. & E. 25 ; 5 Jur. (N.S.) 434.

(*o*) 27 & 28 Vict. c. 101, s. 51.

(*p*) 5 & 6 Will. 4, c. 50.

(*q*) *Easton* v. *Richmond Highway Board*, L. R. 7 Q. B. 69.

(*r*) *Coggins* v. *Bennett*, 2 C. P. D. 568.

(*s*) *R.* v. *Johnson*, 1 F. & F. 657 ; *R.* v. *Wright*, 3 B. & Ad 681 ; *R.* v. *United Kingdom Telegraph Co.*, 31 L. J. M. C. 166.

must make, support, and maintain every public cart-way leading to any market-town twenty feet wide at the least, and every public horse-way eight feet wide at the least; and he is also required to support and maintain every existing public footway by the side of any carriage-way or cart-way three feet at the least,—*scilicet*, if the ground between the fences will admit of it (*t*); but he is not required, without the consent of the inhabitants in vestry assembled, to make or form any public footway; and he must not, in so doing, encroach on the bank adjoining the road, the removal of the smallest portion of the soil being an injury to the land, besides that it tends to alter the evidence of title (*u*). And the justices of the peace, where the highway is not of sufficient breadth, and might be widened and enlarged, are empowered to order such highway, within their respective divisions, to be widened and enlarged, in such manner as they shall think fit, so long as the highway, when widened and enlarged, does not exceed thirty feet in breadth; but these powers do not extend to allow the pulling down of any house or building, or the carrying away of the ground of any garden, lawn, yard, court, park, paddock, planted walk, plantation, or avenue to any house, or any inclosed ground set apart for building-ground or as a nursery for trees; and the property in mines and timber is reserved to the owners of the ground taken for widening the highway; and provision is also made for compensating persons who may be injured, and generally for levying the expenses of the aforesaid improvements (*x*). Also, provision is made for the setting up of direction posts, and of stones or posts to mark the boundaries of the highway (*y*); and for the surveyor making returns concerning the state of the roads, ditches, and fences under his care, and concerning all encroach-

(*t*) 5 & 6 Will. 4, c. 50, s. 80.
(*u*) *Alston* v. *Scales*, 9 Bing. 3; 2 Moo. & S. 5.
(*x*) 5 & 6 Will. 4, c. 50, s. 82.
(*y*) 5 & 6 Will. 4, c. 50, s. 24.

ments and nuisances on or affecting the highway (*z*); all which duties of the surveyor have now devolved upon the authority or board which has (in most cases) now replaced the surveyor (*a*).

Fences along thoroughfares may not be constructed of barbed wire, *i.e.*, of wire with spikes or jagged projections; and such fences, even before the Barbed Wire Act, 1894 (*b*), were a nuisance (*c*).

C. Provisions of road Acts as to maintenance and preservation of roads, and their alteration and repair, and as to hedges and fences along same, and encroachments thereon.—THE GENERAL TURNPIKE ROAD ACT, 1823 (*d*), defines what shall be deemed to be the road within the meaning of the Act, and then goes on to determine how the centre of the road shall be ascertained in terms similar to those used in s. 63 of the General Highway Act, 1835; but it is provided, that nothing in the section shall sanction the making of any encroachment on any waste land lying on the side of the turnpike road, being part of the highway, and over which the king's subjects have been used and accustomed to pass (*e*). Also, the trustees of every turnpike road are empowered to make, divert, shorten, vary, alter, and improve the course or path of any roads under their care and management (*f*); and after any new road set out under the Act is completed, the old road (except in the cases more particularly mentioned in the Act) is to be

(*z*) 5 & 6 Will. 4, c. 50, s. 45.

(*a*) See 25 & 26 Vict. c. 61; 38 & 39 Vict. c. 55; and the Local Government Acts, 1888 and 1894.

(*b*) 56 & 57 Vict. c. 32.

(*c*) *Fenna* v. *Clare*, [1895] 1 Q. B. 199.

(*d*) 3 Geo. 4, c. 126.

(*e*) 3 Geo. 4, c. 126, s. 124. *Vide supra*, p. 189.

(*f*) 3 Geo. 4, c. 126, s. 83, *repealed*, but in substance *re-enacted*, by 9 Geo. 4, c. 77, ss. 8, 9. See also *R.* v. *Burrell*, 10 Cox C. C. 462.

stopped up; and the soil thereof is vested in the trustees, and may be sold or exchanged by them in the manner directed by the Act (*g*); but all mines, minerals, and fossils are reserved to the persons who would have been entitled to the same, if the old road had not been discontinued (*h*). And it ought to be observed, generally, that the trustees of public roads as such have control only over the highway, and that the soil of the road is not vested in them by virtue of their office (unless by the express terms of the particular statute under which they are acting), but belongs to the previous owner (*i*); and, of course, the presumption of law before alluded to, that the soil of a highway *usque ad medium filum viæ*, belongs to the adjoining owners, holds good in the cases and with the exceptions hereinbefore enumerated (*k*).

It is also provided that the surveyor may take materials from waste land for the making and for the subsequent maintenance and repair of the roads (*l*), but all pits and quarries made in so doing are to be properly fenced, and the owners or occupiers of the land next adjoining every turnpike road are to cut, prune, and trim the hedges to the height of six feet from the surface of the ground; and they are also to cut down, prune, or lop the branches of trees, bushes, and shrubs growing in or near the hedges or other fences adjacent thereto (such fences, trees, bushes, or shrubs not being in any garden, orchard, plantation, walk, or avenue to a house, nor any tree, bush, or shrub being an ornament or shelter to a house,—unless the same shall hang over the road or any part thereof in such a manner as to impede or annoy any carriage or person travelling thereon,) in such a manner that the turnpike road shall not be prejudiced by the shade thereof, or the

(*g*) 3 Geo. 4, c. 126, ss. 86—89.

(*h*) 3 Geo. 4, c. 126, s. 88. See also 7 & 8 Geo. 4, c. 24, s. 18.

(*i*) *Davison* v. *Gill*, 1 East, 64, *per* Lord KENYON. See also *Finchley Electric Light Co.* v. *Finchley Urban District Council*, 19 T. L. R. 238.

(*k*) *Marquis of Salisbury* v. *Great Northern Rail. Co.*, 5 C. B. (N.S.) 174.

(*l*) 3 Geo. 4, c. 126, s. 97.

sun and wind excluded therefrom ; and if the owner or occupier neglects his duty in this behalf, the surveyor, after ten days' notice to him, may complain to a justice ; and the justice may order the owner or occupier to comply with the provisions of the Act, on pain of forfeiture ; and the surveyor is thereupon himself to cut and trim the hedges, and to cut down the branches of the offending trees, bushes, and shrubs,—the expenses of so doing being made recoverable in the usual manner, and the months in which the hedges are to be cut and pruned are specified (*m*).

Moreover, any person who makes or causes to be made any dwelling-house or other building, or any hedge or other fence, on or at the sides of the turnpike road, in such manner as to reduce the breadth or confine the limits thereof ; or fills up or obstructs any ditch at the side thereof ; or makes or causes to be made any dwelling-house or other building, or any hedge or other fence, on any common or waste land on the side or sides of the turnpike road,—within thirty-feet, if within three miles of any market town ; or, if beyond that distance, within twenty-five feet, from the middle or centre thereof, shall forfeit 40*s.* to any person making information of the same ; and the trustees are empowered to remove the encroachment or obstruction, and to levy the costs of so doing, with the penalties imposed, in the manner mentioned in the Act (*n*).

THE PROPERTY IN THE FENCES erected by the sides of any turnpike road is vested in the trustees for the time being (*o*) ; and by the Turnpike Road Amendment Act, 1824, if any person wilfully pulls up, throws down, breaks, injures, or damages any posts, rails, or fences placed on the road, either by the side or sides of such road, or at or near to any quarry or pit, which shall

(*m*) 3 Geo. 4, c. 126, ss. 116, 117.
(*n*) 3 Geo. 4, c. 126, s. 118.
(*o*) 3 Geo. 4, c. 126, s. 60.

be used, opened, or made for the purpose of getting stones or other materials for such road, he forfeits a sum not exceeding 40*s*. for every such offence (*p*).

BY THE TURNPIKE ROAD AMENDMENT ACT, 1824, it is provided that where the trustees of any turnpike road turn or alter any part of the turnpike road, or make any new road, over and through any private ground, or across any public or private footway,—or for widening or improving the road take away any fence,—the trustees shall make or cause to be made and planted proper quickset hedges,—or else shall make or build proper walls or fences,—on both sides of such new-made road, or on the side upon which any fence may be so removed as aforesaid,—with sufficient ditches to the same, and sufficient posts and rails, or other fences on both sides of such quickset hedges, to protect the growth thereof,—so as effectually to guard and fence off the lands adjoining any such road from trespass or injury by animals ; and shall keep the fences so made in good order and repair for and during the term of five years, unless the owners or proprietors for the time being of the land or ground shall sooner agree with the trustees to keep the fences in repair (*q*) ; and it has been held to be no excuse to the trustees for not fulfilling the duties required by this section, that they (the trustees) have no funds in hand available for the purpose (*r*).

It appears also to be settled law, that a landowner who allows trustees of turnpike roads to break down fences which he is bound to maintain will be liable for any injury occasioned by the non-repair of such fences, unless he can show that the trustees are bound by virtue of some provision in the statute under which they are acting

(*p*) 4 Geo. 4, c. 95, s. 72. See also 24 & 25 Vict. c. 97, s. 25.

(*q*) 4 Geo. 4, c. 95, s. 66.

(*r*) *R.* v. *Luton Road Trustees*, 1 Q. B. 860 ; 1 G. & D. 248. See also 4 Geo. 4, c. 95, s. 67 ; 9 Geo. 4, c. 77, s. 9.

to reinstate the fences (*s*); but although the trustees may, under their Road Act, have erected fences and also repaired them for several years, it does not therefore follow that they (the trustees) are liable to continue such repairs, unless there is some special provision in their Act which compels them so to do (*t*).

BY THE TOWNS IMPROVEMENT ACT, 1847 (*u*), the commissioners are bound from time to time to place on the side of the footways of the streets under their management such fences and posts as may be needed for the protection of passengers on such footways; and they may also construct safety-crossings in the carriage-ways of such streets; and they may from time to time repair any such fences or the posts or rails constituting such safety-crossings; and may afterwards remove the same or any obstructions in the carriage-way or foot-way (*x*): and their duty to fence the footways is an absolute duty, and not a matter left to their discretion (*y*).

It appears, however, that the remedy in all such cases is by indictment of the parish or of the surveyor of highways,—or of other the local authority or district or county council in whom the office of the surveyor of highways is now vested (*z*),—and not by action for non-repair of the highway whereby damage has been sustained by the plaintiff (*a*). Nor is it otherwise when

(*s*) *Winter* v. *Charter*, 3 Y. & J. 308.

(*t*) *R.* v. *Llandilo Commissioners*, 2 T. R. 232.

(*u*) 10 & 11 Vict. c. 34, s. 52.

(*x*) *Bagshaw* v. *Buxton Local Board*, 1 Ch. D. 220.

(*y*) *Ohrly* v. *Ryde Commissioners*, 23 L. J. Q. B. 296; *Hartnall* v. *Ryde Commissioners*, 33 L. J. Q. B. 39; *Kent* v. *Worthing Local Board*, 10 Q. B. D. 118.

(*z*) 38 & 39 Vict. c. 55; 54 & 55 Vict. c. 76; 51 & 52 Vict. c. 41; 56 & 57 Vict. c. 73. See also 54 & 55 Vict. c. 63.

(*a*) *Russell* v. *Men of Devon*, 2 T. R. 667; *Gibson* v. *Mayor of Preston*, L. R. 5 Q. B. 218; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Thompson* v. *Mayor of Brighton*, [1894] 1 Q. B. 332.

the local authority combines in itself the duties both of the road authority and of the sewerage authority,—at all events, where the defendants have been guilty of no neglect of duty as regards the gratings and manholes, and have been guilty of a mere non-feasance as regards the highway (*b*).

D. Making and fencing of new roads under Inclosure Acts.—SETTING OUT AND MAKING NEW ROADS.—By the General Inclosure Act, 1845 (*c*), the valuer, before proceeding to make any division and allotment of the land to be inclosed, is to set out and make new public roads and ways, and to widen, or else stop up (*d*), the existing or old ones, and the soil of the old roads which shall be stopped up is to be considered as land subject to be inclosed ; but as regards turnpike roads, the consent of a majority of the turnpike trustees to be given at a public meeting duly called for the purpose, is required to any alteration being made by the valuer.

EVERY PUBLIC CARRIAGE-ROAD SO SET OUT AS AFORESAID shall be fenced well and sufficiently on both sides thereof by such persons, interested in the lands to be inclosed, and within such time, as the valuer shall direct (*e*) ; but, in the absence of any direction by the valuer, no duty to fence is imposed either upon the owner or upon the occupier (*f*), and the fencing may in certain cases be dispensed with altogether (*g*). Also, it is provided, that the grass and herbage on the sides of private roads shall

(*b*) *Thompson* v. *Mayor of Brighton*, [1894] 1 Q. B. 332 (following *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345 ; and distinguishing *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430 ; *White* v. *Hindley Local Board*, L. R. 10 Q. B. 219).

(*c*) 8 & 9 Vict. c. 118, s. 62.

(*d*) *Turner* v. *Crush*, 3 Exch. D. 303 ; 4 App. Cas. 221 ; *Hornby* v. *Silvester*, 20 Q. B. D. 797.

(*e*) 8 & 9 Vict. c. 118, s. 65.

(*f*) *Potter* v. *Parry*, 7 W. R. 182.

(*g*) 17 & 18 Vict. c. 97, s. 9.

belong to such persons interested in the lands to be inclosed as the valuer shall direct; and, in the absence of such direction, shall belong to the proprietors on either side of the road (*h*); but no cattle are to be depastured for seven years after the award of the commissioners, on any roads which shall have been fenced on both sides thereof, on pain of being impounded as damage feasant (*i*), the provision not, however, preventing the proprietors of land adjoining private roads and ways from depasturing their cattle thereon as far as the frontages of their respective lands extend.

By the Highway Act, 1864 (*k*), the owners of animals straying upon the highway, or by the sides thereof, are subjected to a penalty; the Act, however, does not take away any existing right of pasturage by the sides of the highway, although the pasturage-owner must, apparently, prevent his animals from straying on the metalled part of the highway (*l*).

The legal presumption that the soil of a highway belongs to the adjoining proprietors *usque ad medium filum viæ* is not applicable to roads set out and for the first time defined under the General Inclosure Act (*m*); but the soil of a road set out over the wastes of a manor remains, throughout its whole width, in the lord of the manor, that portion only of the soil being taken from him, for which he receives compensation and which is allotted to others (*n*).

E. Fencing of allotments under Inclosure Acts.—By the General Inclosure Act (*o*), it is required that allotments made under the Act shall, except as in the Act

(*h*) 8 & 9 Vict. c. 118, s. 68.

(*i*) 8 & 9 Vict. c. 118, s. 100.

(*k*) 27 & 28 Vict. c. 101, s. 25.

(*l*) *Golding* v. *Stocking*, L. R. 4 Q. B. 516.

(*m*) *R.* v. *Edmonton*, 1 Moo. & R. 32; *R.* v. *Hatfield*, 4 A. & E. 164; *Davison* v. *Gill*, 1 East, 64.

(*n*) *Poole* v. *Huskinson*, 11 Mee. & W. 830.

(*o*) 8 & 9 Vict. c. 118, s. 83.

mentioned, be inclosed, ditched, and fenced at the expense of the respective persons, to whom the same shall be allotted, in such manner and within such time as the valuer shall direct; and the fences are ever afterwards to be maintained and repaired by the allottees. Also, where portion of a common to be inclosed is set out as a regulated pasture, the same is to be fenced off from the residue of the common,—in such manner as the valuer shall direct; and he sets out and allots the respective stints or rights of pasturage among the parties in proportion to their rights in the common, such parties becoming the owners of the soil of their respective stints, but without the mines or minerals (*p*). Again, allotments made for the purpose of providing stone, gravel, etc., for the repair of roads are to be fenced as the valuer shall direct (*q*).

Moreover, if the owner or occupier of an allotment neglects to make the fences or ditches required to be made by him, the owner or occupier of any other allotment in the same inclosure, who shall be aggrieved by such neglect, may, after due notice, proceed to make the fences or ditches himself, and may recover the expenses of so doing from the owner or occupier in default (*r*).

With reference to allotments made for public purposes and which are vested in the churchwardens and overseers of the parish in which they are situated, it is provided (*s*), that all such allotments be fenced as the valuer shall direct; and thereafter all the needful repairs to the fences shall be made by and at the expense of the churchwardens and overseers either out of the rents received for the herbage of the allotments, or out of the poor rate; and in the case of any such public allotments being made to private individuals, the allotments shall be by them fenced and preserved in good condition, and may be used as places of

(*p*) 8 & 9 Vict. c. 118, s. 113.

(*q*) 8 & 9 Vict. c. 118, s. 72.

(*r*) 11 & 12 Vict. c. 99, s. 12. The section, however, does not take away any other remedy which the aggrieved party may have.

(*s*) 8 & 9 Vict. c. 118, s. 73.

recreation and exercise by the inhabitants of the parish and others (*t*).

Also, provision is made for fixing the boundaries of village greens, where the boundary is uncertain, by setting out a boundary line between the green and the adjoining land (*u*).

And generally for the purpose of shortening or rendering straight any boundary fences between the land to be inclosed and the adjoining lands, the valuer may, with the consent in writing of the adjoining landowners, set out and determine the boundaries between the land to be inclosed and the adjoining lands, or draw and define a new line of boundary; and the boundaries so set out are to be the boundaries thenceforth, and are to be made, fenced, or ditched by such persons, and in such manner, as the valuer shall direct (*x*). Also, the valuer may make any alteration he may think necessary as regards the fences of allotments (*y*); and allotments may, in certain cases, be left unfenced,—the allotments being in these cases distinguished only by metes and bounds; and until they are fenced, they are to be regarded as being in the nature of regulated pastures (*z*).

(*t*) *Bourke* v. *Davis*, 44 Ch. D. 110; *Hall* v. *Nottingham*, 1 Exch. D. 1.

(*u*) 8 & 9 Vict. c. 118, s. 15.

(*x*) 8 & 9 Vict. c. 118, s. 45.

(*y*) 8 & 9 Vict. c. 118, s. 72.

(*z*) 20 & 21 Vict. c. 31, ss. 1, 2.

CHAPTER X.

A. Ascertainment of boundaries under Inclosure Acts.—As regards lands not subject to be inclosed under the General Inclosure Act, 1845, or as to which no inclosure proceeding is pending, it is provided that where such lands are so intermixed or where the parcels are so inconvenient in form or in quantity, that the same cannot be cultivated or occupied to the best advantage, then the Board of Agriculture and Fisheries may on application of the several landowners make a new division and allotment of the lands (*a*). And by the Inclosure Amendment Act, 1846 (*b*), it is enacted that, where any copyhold or customary land shall be intermixed or held or occupied together with land of freehold tenure or with copyhold or customary land held of another manor, or under other customs or titles, and such copyhold or customary land cannot be identified by the descriptions thereof on the rolls of the manor, and the situation or boundaries of such freehold and copyhold or customary lands respectively shall be unknown or unascertained, whether such lands shall or shall not be subject to be inclosed under the General Inclosure Act, and whether any proceedings for an inclosure thereof shall or shall not be pending, it shall be lawful for the

(*a*) 8 & 9 Vict. c. 118, s. 148 ; 52 & 53 Vict. c. 30 ; 3 Edw. 7, c. 31.

(*b*) 9 & 10 Vict. c. 70, s. 6.

said Board, upon the application in writing of the persons interested in such lands, and with the consent of the lord or lords of the manor or respective manors of which such copyhold or customary lands shall be holden, by order under their seal to appoint and authorise an officer of the Board or any other person to award and declare what part of the lands so intermixed or held or occupied together shall be and be deemed copyhold or customary land and freehold land respectively, or shall respectively be held of each such manor, or under each of such customs or titles respectively, or to determine and declare the situation and boundary thereof, as the case may require ; and there are similar provisions for settling the boundaries of leasehold property, which may happen to be intermixed with other lands (*c*).

Also, where lands or hereditaments are charged with any rent or other fixed payment, the persons interested may apply to the said Board to apportion the rent or other fixed payment among all the lands charged therewith ; and in such case the Board must cause an inquiry to be made into the expediency of the apportionment ; and where there is any doubt as to the extent, identity, or boundaries of the lands charged, it is its duty to inquire into the matter, and after inquiry issue an order for the apportionment of the rentcharge or annual payment, or (as the case may be) for the settlement of the boundaries (*d*). And for the purposes aforesaid, the Board may duly enforce the production of documents (*e*). And the valuer is to draw up, under the direction of the said Board (*f*) an award describing, amongst other things, the boundaries which shall have been ascertained and set out under the provisions of the Act, with a map annexed thereto, but

(*c*) 9 & 10 Vict. c. 70, s. 8.
(*d*) 17 & 18 Vict. c. 97, ss. 10, 11.
(*e*) 31 & 32 Vict. c. 89, s. 4.
(*f*) 17 & 18 Vict. c. 97, s. 104.

which may in certain cases be dispensed with (*g*) ; and it is the duty of the Board to confirm such award as directed by the Act (*h*) ; and its confirmation is made conclusive evidence that all the directions of the Act have been complied with.

B. Ascertainment of boundaries of land when registering title thereto.—For insuring correct descriptions and well-defined boundaries of the property, the title to which it was proposed to register, it was provided by Lord Westbury's Act (*i*), that a person applying for registration of title was required to furnish to the registrar, and the registrar was required to examine and settle, an exact description of the lands to be registered ; and a full and complete schedule or description of the property was also required to be made and deposited in the office of land registry, containing, besides the full particulars of the property, *all the boundaries thereof*, together with the names and addresses of all the owners and occupiers of the lands adjoining, and the name and address of the lord of the manor, if the lands were situate within or held of any manor (*k*). It was also provided that the *identity* of the lands with the parcels or descriptions contained in the title-deeds should be fully established ; and the registrar had power, by such inquiries as he should think fit, to ascertain the accuracy of the descriptions, and the quantities and boundaries of the lands (*l*). For this purpose an official was very commonly sent to view the property itself, and to verify the boundaries thereof, and to ascertain that they were accurately defined ; and this investigation and inquiry required to be conducted in the presence of the adjoining owners and occupiers ; and when the survey and investigation were complete a fair copy of the map as

(*g*) 22 & 23 Vict. c. 43, s. 14.
(*h*) 17 & 18 Vict. c. 97, s. 105.
(*i*) 25 & 26 Vict. c. 53.
(*k*) 25 & 26 Vict. c. 53, s. 7.
(*l*) 25 & 26 Vict. c. 53, s. 10.

settled, with a terrier describing the property, was prepared for deposit in the office of land registry, it being provided that, except in the case of incorporeal hereditaments, a map or plan should be made and deposited as part of the description of the property intended to be registered (*m*).

The description of the estate, as finally approved, with any map annexed thereto, was required to be entered in the registry (*n*); and if there was any disputed question of boundary between the applicant and any adjoining proprietor, which had not been previously determined, the parties, or either of them, might lodge an objection in writing to the determination of such question; and if any such objection was lodged, the registrar was required to specify upon the record of title the existence of such disputed question of boundary, and the registration was made subject thereto (*o*) in all cases (*p*).

The Land Transfer Act, 1875 (*q*), provided that applications for registration of an estate under Lord Westbury's Act might be entertained after January 1st, 1876 (*r*); and lands theretofore registered under the Act of 1862 may be re-registered, free of expense, but need not have been so re-registered (*s*); and if not re-registered, the provisions of the Act of 1862 remained applicable to them. And where the registration of land,—or the re-registration of it,—proceeded under the Land Transfer Act, 1875, then the registered land was to be described in such manner as the registrar thought best calculated to secure accuracy; but such description was not conclusive as to the boundaries and extent of the registered land (*t*).

(*m*) 25 & 26 Vict. c. 53, s. 10.

(*n*) 25 & 26 Vict. c. 53, s. 14.

(*o*) *Ex parte Drew's Estate*, L. R. 2 Eq. 206.

(*p*) Registration, however, was not continued under this Act after 1874.

(*q*) 38 & 39 Vict. c. 87.

(*r*) 38 & 39 Vict. c. 87, s. 125.

(*s*) 38 & 39 Vict. c. 87, s. 126.

(*t*) 38 & 39 Vict. c. 87, s. 83 (5).

The difference between registration under Lord Westbury's Act, 1862, and the Land Transfer Act, 1875, appeared to be this, that in the case of registration under the former Act, not only the title to, but also the boundaries of, the property were ascertained and guaranteed; whereas in the case of registration under the latter Act, the title was ascertained and guaranteed, but the boundaries were not; and upon this difference as regards the boundaries of registered land, according as registration took place under Lord Westbury's Act or was under the Land Transfer Act, 1875, it may be remarked that there was no reason why the registrar should have been charged with the duty of deciding questions of boundary as between adjoining owners, and there were many reasons why he should not have been; for in practice, boundaries never create any difficulty in the buying and selling of property, questions of boundary being managed quite easily on the spot; and a settlement of boundaries by the registrar would inevitably have led to vexatious litigation.

Under the Land Transfer Act, 1897 (*u*), registered land must be described in the prescribed manner by means of the Ordnance map together with such verbal particulars as the applicant for registration may desire, and the registrar or the court, if the applicant prefers, may approve, regard being had to ready identification of parcels, and correct description of boundaries (*x*).

(*u*) 60 & 61 Vict. c. 65.

(*x*) 60 & 61 Vict. c. 65, s. 14 (2). The boundaries must be shown by an edging of red, and if it be desired to indicate the precise position of the boundaries, notice must be given to the owners and occupiers of the adjoining lands of an intention to ascertain and fix the boundary with such plan, etc., or extract from the proposed verbal description of the land as may be necessary to show clearly the fixed boundary, and except when the fixed boundary has been ascertained, the map indicates the general boundaries only (Land Transfer Rules, 1898, rr. 209—221).

CHAPTER XI.

A. Ownership of boundary trees.—With respect to the ownership of trees standing on or near the boundaries of property, the rule, generally adopted in the United States of America, is that trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of the adjoining owner, and that trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common (*a*); and the rule is at once reasonable and simple.

The English authorities on the subject are more or less undecided; and it is desirable to consider them at some length, in order to discover how far they agree or disagree with the United States rule: Thus, in an action of trespass for breaking into the plaintiff's close and taking away his boards (*b*), the defendant justified, on the ground that there had been a great tree which grew between the close of the plaintiff and that of the defendant, and the roots of which had extended into the close of the defendant, so that the tree had been (in part) nourished by the defendant's soil, and the plaintiff had cut down the tree and carried it away into his own close and there sawed it into boards,—whereupon the defendant entered, took some of the boards, and carried

(*a*) *Griffin* v. *Bixby*, 12 N. H. 454; *Lyman* v. *Hale*, 11 Conn. 177; 3 Kent Comm. 582 n.; 1 Hilliard on Real Property, 10.

(*b*) *Masters* v. *Pollie*, 2 Rolle Rep. 141.

them away, as he lawfully might do,—and a demurrer was allowed on the ground that, although some of the roots of the tree were in the defendant's soil, yet the body of the tree being in the plaintiff's land, the rest of the tree also belonged to the plaintiff, but it was conceded by the whole court, that if the plaintiff had planted the tree in the soil of the defendant, it would have been otherwise.

On the other hand, it was ruled that if A. plants a tree upon the *extreme limit* of his land, and the tree growing extends its roots into the land of B. next adjoining,—as it inevitably must do,—in such case, A. and B. are tenants in common of the tree. But if (by any freak of nature) all the roots grow into the land of A., though the boughs overshadow the land of B., yet (the branches following the roots) the property of the whole is in A. (*c*).

Again, where a hedge divided the lands of A. and B., and there was a great tree in the hedge, the roots of which took nourishment in the land of A. and also of B., the court held that A. and B. were tenants in common of the tree (*d*). And where the body of the tree was in the defendant's land, some only of the roots growing into the plaintiff's land, and the defendant cut down the tree, and the plaintiff brought trespass against him for so doing, it was said that the jury could not, in respect of the proportion of nourishment derived by the tree, find for either party; and the safest course was to consider whether, from the evidence as to the situation of the trunk and of the roots, it could be ascertained where the tree was first sown or planted,—and to find for the plaintiff or for the defendant accordingly (*e*).

From these decisions it is difficult to derive any clearly settled rule: but possibly it may be safe to say, Firstly, that a tree planted in the boundary line itself, as in the hedge, or on the extreme limit of one person's land is the common property of the two coterminous proprietors,

(*c*) *Waterman* v. *Soper*, 1 Ld. Raym. 737.
(*d*) *Anon.*, 2 Rolle Rep. 255.
(*e*) *Holder* v. *Coates*, M. & M. 112.

—for, in either of such cases, the trunk must inevitably in the natural course of growth stand and grow upon the lands of each, and the roots also will in such case inevitably extend into the soil of each; and each proprietor must have originally intended that; but, secondly, that a tree which was planted originally within one person's boundary,—and not upon the boundary or close to it,—is such person's tree, and continues to be his tree, notwithstanding that it may in time extend its roots into his neighbour's soil,—and although the trunk itself may (in the course of long years of growth) come insensibly to press upon, and to pass across, the boundary line, —for in a case of this kind, the court might say that the latter person's land,—the part thereof appropriated by the trunk,—was, by a species of alluvion, insensibly annexed in legal ownership to the land of the former (*f*).

And it has been said that the extension of the roots from the soil of an adjoining owner into that of another cannot make them owners in common of a tree, which (prior to such extension) had clearly been in the sole ownership of one; and it being conceded that the overhanging of the branches do not affect the true ownership of the tree,—and that the measure of nourishment derived by means of the roots from the soil of each proprietor is an impracticable test,—it is apparently considered that the original situation of the trunk of the tree is the only available criterion of the true ownership (*g*).

There appears to have been as yet no decision upon the question, whether one proprietor can, in the absence of agreement, compel another to have his land burdened with the roots of his neighbour's tree (*h*); such an easement (if it be an easement) could, of course, only be acquired adversely by an enjoyment which was *open* and *as of right;* still, the law not requiring impossibilities but recognising the course of nature, the easement or

(*f*) See *Lemmon* v. *Webb*, [1894] 3 Ch. 1; [1895] A. C. 1.
(*g*) *Lyman* v. *Hale*, 11 Day (Conn.), 177, 182.
(*h*) *Partridge* v. *Scott*, 3 M. & W. 229.

right in question may doubtless be legally acquired,—as by grant or agreement, so by prescription or adverse enjoyment (*i*),—but, in a modern case, the contrary has been suggested, although by way of *obiter dictum* only: Thus, where it was contended on behalf of a plaintiff that, having regard to the age of the trees, and of the projecting branches, he had acquired a right to the exclusive possession of so much of the space above the defendant's soil as the branches actually filled; and that, either under the Statute of Limitations or by prescription, the plaintiff had a right to keep the branches there where they had grown, because, if a man erected on his own land something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove the projection or maintain any action in respect of it, it was observed that to plant a tree on one's own land was a different thing; the mere planting of it infringing no right; and if the tree subsequently grew over or came to overhang the soil of another, no action would lie for the encroachment, unless damage was proved (*k*).

The rules of the Roman civil law on the subject of boundary trees are that, if a tree strikes its roots into the neighbouring soil, nevertheless it remains his in whose land it had its origin (*l*); but that if a tree planted near a boundary extends its roots into the lands of a neighbour it becomes common (*m*). It appears, however, that the second rule applies only to the case of a tree planted on the very edge or boundary line of the property (*n*).

(*i*) *Dalton* v. *Angus*, 6 App. Cas. 740.

(*k*) *Lemmon* v. *Webb*, [1894] 3 Ch. 1; [1895] A. C. 1 (citing *Pickering* v. *Rudd*, 4 Camp. 219, in which case Lord ELLENBOROUGH thought that trespass would not lie for the reason that the owner of a tree which gradually grows over or into his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow, or into which its trunk, by the gradual growth thereof in thickness, insensibly extends).

(*l*) Dig. xlvii. 7, 6, s. 2.

(*m*) Dig. xli. 1, 7, s. 13; Inst. ii. 1, s. 31.

(*n*) Gale on Easements, 5th ed., p. 527.

By the French Code, it is provided as follows: By Article 671, it is not allowable to plant trees of lofty trunk, except at such distance from the boundary as is prescribed either by particular regulations actually existing or by constant and acknowledged usages; and in default of such regulations or usages, only at the distance of two metres from the line which separates the two estates,—in the case of trees of lofty trunk; and at the distance of half-a-metre,—in the case of other trees and quick hedges; and by Article 672, a neighbour may require trees and hedges planted at a less distance to be pulled up. But by Article 673, trees which are found in a common hedge are common like the hedge; and each of the two proprietors has a right to require that they shall be felled.

B. Remedies for injuries arising from overhanging branches or projecting roots.—Whatever unlawfully annoys or does damage to another is a nuisance; and such nuisance may, in general, be abated, that is, taken away or removed by the party aggrieved thereby,—so long as he commits no breach of the peace in the abatement (*o*). If, therefore, the boughs of one proprietor grow out into the land of his neighbour, that is a private nuisance; and the boughs may be cut down,—but not in the mere fear that eventually they may become a nuisance (*p*); but the same rule is clearly inapplicable to roots which strike into the neighbouring soil, other considerations being in that case applicable (*q*).

It is not a nuisance to allow a yew tree to grow near the boundary of a neighbour's land,—where his cattle cannot reach to and eat the leaves of it, without tres-

(*o*) 5 Rep. 101; *Perry* v. *Fitzhowe*, 8 Q. B. 776; *Jones* v. *Jones*, 1 H. & C. 1; 3 Bla. Com. 6; *Lane* v. *Capsey*, [1891] 3 Ch. 411.

(*p*) *Norris* v. *Baker*, 1 Roll. Rep. 394; 2 Bulst. 198; Vin. Abr. Trees, E.

(*q*) See also *Lemmon* v. *Webb*, [1894] 3 Ch. 1; [1895] A. C. 1.

passing across the boundary (*r*): *secus*, if it overhangs the boundary, or is otherwise within reach, without a trespass (*s*).

If the occupier of land suffers his trees so to protrude over the highway as to inconvenience passers by, that is a public or common nuisance, and the trees may be lopped (sufficiently to avoid the evil) by any of the public passing that way; for any one may justify the removal of a public or common nuisance which is so remediable (*t*); and, in fact, by the old law nobody was bound to cut his trees that overhung the road, and, therefore, anyone might do it (*u*).

The reason, why the law allows the summary remedy by abatement, is because injuries which obstruct such things as are of daily convenience and use, require an immediate remedy and cannot wait for the slow process of the ordinary law (*x*); but the remedy by abatement, where it would be the cause of serious danger, is excluded by that very consideration; and therefore, where, *e.g.*, a fence belonging to a railway company obstructs the thoroughfare, the public may not prostrate it, but must apply for a *mandamus* or pursue some other legal remedy for its removal (*y*).

In abating a nuisance arising from overhanging branches, care also must be taken only to cut off so much as actually overhangs the land of the party injured; for otherwise one may render himself liable to heavy

(*r*) *Ponting* v. *Noakes*, [1894] 2 Q. B. 281. See also *Wilson* v. *Newberry*, L. R. 7 Q. B. 31.

(*s*) *Erskine* v. *Adeane*, L. R. 8 Ch. 756; *Crowhurst* v. *Amersham Burial Board*, 4 Exch. D. 5.

(*t*) 1 Hawk. P. C. 695; *Earl of Lonsdale* v. *Nelson*, 2 B. & C. 311.

(*u*) 2 Bro. Abr. Nuisances, 28, *per* KEBLE, J., in 8 Hen. 7, c. 5; Dalton, c. 26.

(*x*) 3 Bl. Com. 6.

(*y*) *Ellis* v. *London and South Western Rail. Co.*, 2 H. & N. 424; *Wyatt* v. *Great Western Rail. Co.*, 6 B. & S. 709.

damages (*z*). And the like moderation must be observed in the abatement of all private nuisances, and also in the abatement of a public nuisance.

Also, in the case of a public nuisance, it is well settled that the party abating it must show special damage from the nuisance, and only can interfere with the nuisance so far as is necessary to the exercise of his own right of passing along the highway (*a*) and not justify any unnecessary damage done to the property of the person who has placed the nuisance in the highway (*b*).

Also, although a man may justify entering the land of another to abate a nuisance, yet before entry it seems advisable in all cases to send notice to the other proprietor, in order first to give the latter an opportunity of removing the obstruction himself (*c*). But with regard to the necessity of such notice, there is a distinction between nuisances committed in defiance of those whom such nuisances injure, and nuisances from mere omissions: in the former case, the injured party may abate them without notice to the person who committed them; in the latter it does not seem that an individual may abate without notice, except in the case of the overhanging branches of trees, the permitting of which to overhang injuriously, is a most unequivocal act of negligence which distinguishes that case from other cases (*d*).

(*z*) *Traherne's Case*, Godb. 233; *Batten's and Simpson's Case*, 9 Rep. 53; *R.* v. *Pappineau*, 2 Stra. 686; *Cooper* v. *Marshall*, 1 Burr. 268; *Houghton* v. *Butler*, 4 T. R. 364; *Roberts* v. *Rose*, 4 H. & C. 103; 3 H. & C. 162; *Pickering* v. *Rudd*, 1 Stark. 56.

(*a*) *Bridge* v. *Grand Junction Rail. Co.*, 3 M. & W. 244; *Davies* v. *Mann*, 10 M. & W. 546; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339.

(*b*) *Dimes* v. *Petley*, 15 Q. B. 276; *Bateman* v. *Bluck*, 18 Q. B. 870; *Lodie* v. *Arnold*, 2 Salk. 458; 1 Hawk. P. C. 695.

(*c*) *Davies* v. *Williams*, 16 Q. B. 556; 1 Chit. G. P. 569, 570.

(*d*) *Lonsdale* v. *Nelson*, 2 B. & C. 311.

In general, also, a distinction requires to be taken, according as the nuisance was *created* by the offender or is only *continued* by him; for in the latter case, notice before abatement is, in general, necessary (*e*). For example, when A. builds a house, so that it overhangs the house of B., and is a nuisance to B.; and afterwards A. makes a feoffment of his house to C., and B. makes a feoffment of his house to D.,—the nuisance continuing,—D. cannot abate the nuisance,—or have a *quod permittat prosternere* for it,—before he makes a request to C. to abate it. For C. is a stranger to the wrong; but it would be otherwise, if A. continued his estate,—for he did the wrong (*f*). It appears, however, that as regards the overhanging branches of trees (and possibly also projecting roots of trees),—where they can be abated without trespassing upon the plaintiff's land,—notice or request before abatement is not in any case necessary: for, where it appeared that the defendant had,—but without entering upon the plaintiff's land,—cut certain large boughs of trees standing on the plaintiff's land and which overhung the defendant's land, and had done so without any previous notice or request to the plaintiff, the Court held that the defendant was entitled to do what he did, and to do so without any previous notice or request to the plaintiff (*g*): and in this case it was observed that the right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, was too clear to be disputed (*h*); and that there is no trace of the age of the tree or its branches being a material circumstance for consideration; and that as regards the overhanging

(*e*) *Winsmore* v. *Greenbank*, Willes, 583; *Salmon* v. *Bensley*, Ry. & Moo. 189.

(*f*) *Penruddock's Case*, 5 Rep. 100. See also *Jones* v. *Williams*, 11 M. & W. 176.

(*g*) *Lemmon* v. *Webb*, [1894] 3 Ch. 1; [1895] A. C. 1.

(*h*) 2 Bro. Abr., Nuisances, p. 105, pl. 28; *Norris* v. *Baker*, 1 Roll. 393; *Pickering* v. *Rudd*, 4 Camp. 219; 1 Stark. 56; *Crowhurst* v. *Burial Board of Amersham*, 4 Ex. D. 5.

branches of trees, it is clear that they may be lopped by the owner of the land over which they hang without notice, the right so to lop them, however old they may be, being an exception to the general rule which requires notice before abatement, and this is equally true with respect to the right to cut roots; and that, in other words, the right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice, so long as he confines himself and his operations to his own land, including the space vertically above and below its surface.

A party who creates a public nuisance by allowing the branches of his trees to grow over the highway may be proceeded against, either by indictment, or by information at the suit of the Attorney-General; but the summary remedy of complaint to the vestry or other proper local authority, is the most convenient remedy, in the general case,—for the vestry or other competent authority will give notice to the occupier to cut the overhanging branches, and (on his failure so to do) will cut them themselves. And in case any individual landowner (or, *semble*, other person whosoever) suffers some private and particular damage from the overhanging trees,—*scilicet*, some damage beyond the injury done to him as one of the public,—he may proceed by action (*i*); and in such case, the Attorney-General need not be (*k*), but may be (*l*), made a party.

C. Ownership of branches and fruit fallen on adjoining lands.—At civil law, if a tree on the boundary line between two properties in a town injured either property, the owner of the tree might be required to cut

(*i*) *Winterbottom* v. *Lord Derby*, L. R. 2 Exch. 316; *Rickett* v. *Metropolitan Rail. Co.*, 5 B. & S. 156; *Attorney-General* v. *Logan*, [1891] 2 Q. B. 100.

(*k*) *Cook* v. *Mayor of Bath*, L. R. 6 Eq. 177; *Walker* v. *Horner*, 1 Q. B. D. 4; *Woodard* v. *Billericay Highway Board*, 11 Ch. D. 214.

(*l*) *Attorney-General* v. *Logan*, *supra*.

it down altogether, but if the properties were in the country, he could be required only to trim the branches of the tree fifteen feet up from the ground, and no higher, whatever the inconvenience might be to his neighbour; and in case the party who was required to cut down the tree or to trim the branches refused so to do, the interdict *de arboribus cædendis* lay against him, at the instance of the other party; and he might appropriate the wood to himself (*m*). But, by the English law, although a man may remove a nuisance, yet he cannot, in general, appropriate the materials and convert them to his own use (*n*); accordingly, a person can have no right to the overhanging branches or protruding roots which he cuts from his neighbour's trees, or to the fruit or the branches which fall accidentally therefrom: Thus, it has been said, if trees growing in a hedge overhang another man's land, and the fruit of them falls upon the other's land, the owner of the fruit may go in and retake it, if he makes no longer stay than is convenient, and does not break the hedge (*o*); so, if trees are blown down by the wind, or fall over by any other unavoidable accident (*p*).

The owner, however, of the fruit cannot, without special circumstances shown to justify it, enter upon the adjoining land on which the fruit has fallen for the purpose of taking such fruit away without a previous request to the occupier upon whose land the fruit has fallen (*q*), and after such request, a conversion may be presumed if entry be refused, and in such case, the owner of the fruit may enter and take his property. And, at civil law, the proprietor upon whose land fruit had fallen from trees belonging to an adjoining proprietor was

(*m*) Colquhoun's Summary, § § 993, 2305.

(*n*) *Forsdick* v. *Collins*, 1 Stark. 173; *Houghton* v. *Butler*, 4 T. R. 364.

(*o*) *Millen* v. *Fandrye*, Poph. 163.

(*p*) Vin. Abr. Trespass. Ha. 2.

(*q*) *Anthoney* v. *Haney*, 8 Bing. 186.

obliged to permit it to be gathered,—a right which was enforced by the interdict *de glande legendâ* (*r*).

The Crown may lawfully grant to a parish within a royal forest the right to cut or lop boughs and branches above seven feet from the ground for the purpose of fuel (*s*) ; and may also lawfully grant to the people of the parish, or to those of them who keep pigs, a right of pannage, or right to allow their pigs to go into the wood and to eat the acorns or beech-mast, which have fallen to the ground ; but, of course, these rights or either of them do not prevent the owner of the wood from lopping the trees in the ordinary course of management, or from cutting them down for timber when ripe (*t*).

(*r*) Colquhoun's Summary, § 993.

(*s*) *Willingale* v. *Maitland*, L. R. 3 Eq. 103 ; *Commissioners of Sewers* v. *Glasse*, L. R. 19 Eq. 134.

(*t*) *Chilton* v. *Corporation of London*, 7 Ch. D. 562.

CHAPTER XII.

A. Evidence of boundaries in general—GRADATIONS OF THE EVIDENCE.—There are, of course, gradations in the evidence of boundaries, just as there are gradations or degrees in evidence generally; and according to Mr. Greenleaf (*a*), there are the following gradations in the evidence of boundaries, that is to say:—Firstly, the highest regard is to be paid to natural boundaries; and regard is to be had nextly to lines actually run, and to courses actually marked, at the time of the transaction; and then, thirdly, regard may require to be had to the lines and courses of the adjoining boundaries; and, lastly, regard is to be had to defined acreages and measurements. Therefore, whenever the description of the land conveyed is with reference to known monuments, these are in

(*a*) 1 Greenleaf on Evidence, 436.

general to govern (*b*),—although neither the courses, or the distances, or the computed acreages should exactly correspond; and if the description in a deed is by reference to a stake and stones, and at the date of the deed no such stake or stones are in situation, but the parties afterwards, with intent to conform to the deed, erect the stake and stones as the boundary mark, that mark will govern the description,—although it should not exactly coincide with the acreage stated in the deed (*c*); for whether the mark or monument is erected simultaneously or subsequently, although it may affect the weight of the evidence, does not affect its nature or character (*d*).

RULE OF THE STRAIGHT LINE BETWEEN LANDMARKS.—A boundary line described as running from one landmark to another is always *primâ facie* presumed to be a straight line (*e*); but the *primâ facie* presumption may be excluded, and that either by evidence to be derived from the deed itself in which the description occurs, or by evidence extrinsic thereto; and even considerations of convenience will be admitted, if thereby a reasonable determination of the boundary can be arrived at: Thus (*f*), where the defendants agreed to let to the plaintiff for 300 years at a nominal rent, the flat part of the beach opposite to the plaintiff's field, and the plaintiff claimed all the beach comprised between lines drawn in prolongation of the sides of his field,—the court held, that the boundaries of the demised beach were lines drawn from the extremities of the plaintiff's field *perpendicular to the coast line;* for otherwise great inconvenience to the other and neighbouring owners adjoining the beach would result from adopting the plaintiff's contention.

(*b*) *Davis* v. *Rainsford*, 17 Mass. 210; *Raynor* v. *Timerson*, 46 Barb. (N.Y.) 518.

(*c*) *Makepeace* v. *Bancroft*, 12 Mass. 429.

(*d*) *Owen* v. *Bartholomew*, 9 Pick. 519; *Waterman* v. *Johnson*, 13 Pick. 267.

(*e*) 2 Washburn, 631, 632.

(*f*) *Crook* v. *Seaford*, L. R. 6 Ch. 551.

ADMISSIBILITY OF EXTRINSIC EVIDENCE.—Regarding extrinsic evidence, and its availability in questions of boundary, there are the two general maxims following regarding its admissibility, that is to say :—Firstly, it cannot be used to vary or to contradict the deed ; but it is admissible to *identify* the descriptions (*scilicet*, the parcels) in a deed, and incidentally to *explain* these descriptions, in a case where the descriptions in the deed are ambiguous, and the ambiguity is a *latent* one, but not also where the ambiguity is a patent ambiguity. And as auxiliary to the application of the latter of the two maxims, the courts have formulated the two subordinate and correlative rules or maxims following, that is to say :—

(1) *Falsa demonstratio non nocet, cum de corpore constat*, —which (being interpreted) means, that a false description, by way of *addition*, does not matter where the thing itself is otherwise sufficiently described and ascertained ; and

(2) *Non debent accipi in falsam demonstrationem, verba quæ competunt in veram limitationem*,—which (being interpreted) means, that words of additional description which have an actual applicability are not to be treated as *falsa demonstratio ;* for the corpus itself not being sufficiently defined without the words of additional description, these latter words operate to further define it, and usually (although not invariably) to restrict it. In other words, where there is a sufficient description set forth of premises, by giving the particular name of a close or otherwise, a false demonstration may be rejected ; but if the premises be described in general terms, and a particular description be added, the latter controls the former (*g*).

And even a specific description may be rejected, when it is clearly erroneous : Thus, where premises in a deed

(*g*) *Doe* v. *Galloway*, 5 B. & Ad. 43. See also *Taylor* v. *Parry*, 1 M. & G. 604, 623 ; *Boyle* v. *Mulholland*, 10 Ir. C. L. R. 157 ; *Travers* v. *Blundell*, 6 Ch. D. 436 ; *Seal* v. *Taylor*, [1894] 1 Ch. 316 ; *Herrick* v. *Sixby*, L. R. 1 P. C. 436.

were described as "Lot No. 51 bounded as follows: beginning at a stake and stones," etc., the monuments, courses, and distances being added; and it appeared that the grantor owned no land in Lot No. 51, but owned Lot No. 50, which corresponded in every respect with the added descriptions, it was held that the words "No. 51," although specific enough, might be rejected as surplusage, the description being sufficiently certain without them (*h*).

And where a manor lies partly in D. and partly in S., and there is a grant of the manor in D., no part of the manor in S. will pass; just as, under a grant of the manor of D., lying within the parishes of A. and B., no part of the manor lying in the parish of C. will pass (*i*).

But under the grant of a close called D., in the parish of H., in the county of S., if it be found that the parish of H. extends also into the county of B., and the whole of the close is in the last-mentioned county, the words "*in the county of S.*" will be rejected as a false addition easily accounted for, and the false addition will not invalidate the grant (*k*).

And where a piece of land, formerly part of a close, was conveyed by reference to a schedule annexed, and in the schedule it was described as numbered 153 on the plan, and as being in the occupation of J. E., and as containing, by estimation, thirty-four perches; and the plan was drawn to a scale, but it appeared that upon the admeasurement of the land upon the plan, the piece of land contained, in fact, only twenty-seven perches instead of thirty-four,—the court held that the statement that the piece of land contained thirty-four perches was merely

(*h*) *Loomis* v. *Jackson*, 19 Johns. 449.

(*i*) Shep. Touch. 29; *Pedley* v. *Dodds*, L. R. 2 Eq. 819; *Smith* v. *Ridgway*, L. R. 1 Ex. 46, 331; *Webber* v. *Stanley*, 16 C. B. (N.S.) 698; 2 Taylor on Evidence, 5th ed., 1046—1051.

(*k*) *Austen* v. *Nelms*, 1 H. & N. 225; *Doe* v. *Ashley*, 10 Q. B. 663; *Doe* v. *Hubbard*, 15 Q. B. 236; *Goodtitle* v. *Southern*, 1 M. & S. 299; *Dyne* v. *Nutley*, 14 C. B. 122; *Rand* v. *Green*, 9 C. B. (N.S.) 477; *Manning* v. *Fitzgerald*, 29 L. J. Ex. 24; *White* v. *Birch*, 35 L. J. Ch. 174.

falsa demonstratio, and accordingly that the deed conveyed only the portion of land containing twenty-seven perches actually marked off on the plan (*l*).

If in a deed conveying land the description of the parcels is couched in such ambiguous terms (*m*) that it is very doubtful what were intended to be the boundaries of the property, and the language of the description equally admits of two different constructions, of which the one would make the quantity of land conveyed agree with the quantity mentioned in the deed, and the other would make the quantity altogether different, the former construction must prevail (*n*).

The construction of all written documents is for the judge; but by way of aiding him in such construction it is competent and proper for the jury to find all the surrounding facts, including the meaning of the words used; but to leave the interpretation that is the construction of the document to the jury, would be a misdirection (*o*).

Parcel or no parcel of the property conveyed is always a question for the jury, being merely a question of evidence (*p*); and upon that question all facts relating to the subject-matter and object of the deed, such as that the property comprised in it did or did not belong to the grantor, the mode of acquiring it, the local situation, limits and distribution of the property,—are admissible to aid in ascertaining what is meant by the words used in the instrument (*q*). Therefore parol evidence has been admitted to show which of two monuments was the one intended by

(*l*) *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183. See also *Dublin and Kingstown Rail. Co.* v. *Bradford*, 7 Ir. C. L. R. 57, 624; *Roe* v. *Lidwell*, 9 Ir. C. L. R. 184; *Jack* v. *Macintyre*, 12 C. & F. 151.

(*m*) *Herrick* v. *Sixby*, L. R. 1 P. C. 436, 451, 452.

(*n*) *Davis* v. *Shepherd*, L. R. 1 Ch. 410; *Marshall* v. *Berridge*, 19 Ch. D. 233; *Tamplin* v. *James*, 15 Ch. D. 216.

(*o*) 1 Taylor on Evidence, 5th ed., p. 56; *Skull* v. *Glenister*, 33 L. J. C. P. 185; *L'Estrange* v. *Rowe*, 4 F. & F. 1048, 1053.

(*p*) *Doe* v. *Burt*, 1 T. R. 704; *Lyle* v. *Richards*, L. R. 1 H. L. 222.

(*q*) *Doe* v. *Martin*, 4 B. & Ad. 785; *M'Murray* v. *Spicer*, L. R. 5 Eq. 527; *Baird* v. *Fortune*, 7 Jur. (N.S.) 926; 2 Taylor on Evidence, 5th ed., 1027, 1028.

the deed (*r*); and where the deed described land as bounded by a certain pond and, upon applying the deed to the local objects embraced within its descriptive terms, it appeared that the water in the pond, which was a natural pond, was of a different elevation at different times, being raised and lowered by means of a dam existing and in use at the time of the conveyance,—it was held that parol evidence was admissible to show, that a certain line was agreed on (and understood at the time of the conveyance) as the boundary of the pond (*s*).

Where by a mistake common to both parties, a piece of land not intended to be comprised in the conveyance is delineated on the plan annexed to the conveyance as parcel of the hereditaments conveyed, the remedy in such case is a rectification of the deed (*t*); but while the deed remains unrectified, it is not open to show by parol evidence that, upon the true construction of the deed, the piece of land in question is not comprised in the conveyance; and conversely, it is not competent to control the boundaries expressed in the deed by parol evidence tending to show that the parties supposed other and additional land to be included in the conveyance (*u*). And in an action between two adjoining proprietors, brought to try the right to a slip of land claimed by the plaintiff as part of Chale Farm, and by the defendant as part of Gotton Farm, it appearing that the boundary had been settled and boundary stones set up by arrangement some years before,—the slip of land in question not being then included in Gotton Farm, and the deed by which the defendant's farm was conveyed to him purporting to convey all that messuage or farm-house, with the barns, sheds, etc., and closes, pieces, or parcels of land thereto

(*r*) *Clough* v. *Bowman*, 15 N. H. 504.

(*s*) *Waterman* v. *Johnson*, 13 Pick. 261. See also *Bradley* v *Rice*, 13 Metc. 200, 201; *Doe* v. *Jersey*, 1 B. & Ad. 550; *Paddock* v. *Fradley*, 1 Cr. & Jer. 90; *Gillingham* v. *Gwyer*, 16 L. T. (N.S.) 640.

(*t*) *Harris* v. *Pepperell*, L. R. 5 Eq. 1; *In re Tottenham's Estate*, 2 Ir. R. Eq. 375.

(*u*) 2 Washburn on Real Property, 636.

belonging, called Gotton Farm, in the occupation of D. B., and containing, etc., and consisting of the several particulars specified in the schedule, etc., and more particularly delineated on the map or plan thereof drawn in the margin of the schedule,—the slip of land in question not being mentioned either in the schedule or in the plan,—the judge ruled that the deed was unambiguous ; and no latent ambiguity emerging, he rejected the evidence of certain witnesses whom the defendant proposed to call in order to prove that the slip of land in question had always been occupied with and treated as part of Gotton Farm (*x*).

If to the description of a messuage or tenement in a conveyance there be added general words, such as "with all buildings, *gardens*, ways, etc., *commonly used or occupied therewith*," evidence is admissible to show to what things these general words apply, and to explain them ; but such evidence is not admissible for the purpose of varying the deed,—by proving that a garden commonly occupied with the principal messuage was expressly, by the conditions of sale, excepted from the purchase, or by proving declarations by the purchaser subsequent to the sale that the garden was not in fact part of the purchase (*y*). But in a conveyance of land "*with the appurtenances*," only incorporeal hereditaments will pass, and not lands in addition to those granted,—because land cannot be appurtenant to land (*z*), unless, possibly, the foreshore were parcel of a manor (*a*).

(*x*) *Burton* v. *Dawes*, 10 C. B. 261 ; 19 L. J. C. P. 302. See also *Boyle* v. *Mulholland*, 10 Ir. C. L. R. 150 ; *Smith* v. *Ridgway*, L. R. 1 Ex. 46, 331 ; *Read* v. *Read*, 15 W. R. 164 ; *Harman* v. *Gurner*, 35 Beav. 478.

(*y*) *Doe* v. *Webster*, 12 A. & E. 442 ; *Doe* v. *Holtom*, 4 A. & E. 76 ; *Dobbyn* v. *Somers*, 13 Ir. C. L. R. 293 ; *Murley* v. *M'Dermott*, 8 A. & E. 138 ; *Williams* v. *Morgan*, 15 Q. B. 782 ; *Clough* v. *Bowman*, 15 N. H. 504 ; *Jones* v. *Whelan*, 15 Ir. C. L. R. 495 ; *Moxey* v. *Bigwood*, 4 De G. F. & J. 351.

(*z*) *Lister* v. *Pickford*, 34 Beav. 576 ; *New York Central Rail. Co.* v. *Buffalo Rail. Co.*, 49 Barb. (N.Y.) 501, 505 ; *Lethbridge* v. *Lethbridge*, 4 De G. F. & J. 35 ; Co. Litt. 121 b ; *Smithson* v. *Gage*, Cro. Jac. 525.

(*a*) *North British Rail. Co.* v. *Young*, 12 App. Cas. 544.

When the construction of a deed is doubtful, great weight is to be given to the construction put upon it by the parties, especially in doubtful questions of boundary, —for these must be presumed to be within their knowledge ; and therefore when both parties agree as to the boundaries and lines of a lot, these must be taken to be the true boundaries and lines, until the contrary appears (*b*). Also, all ancient grants may be explained by evidence of modern usage (*c*) : Thus, modern acts of ownership have been admitted to show, that ancient grants of King John and King Edward I. included the sea-coast down to low-water mark (*d*) ; and to show that the words " river L." in an ancient patent comprised the bed of the river down to the point where it reached the sea, or that the words comprised the bed of the river only down to a certain ford some distance up the river (*e*) ; and to show that the sea-shore is parcel of the manor (*f*) ; and to show that the right of cutting timber for building purposes extends to the right of cutting it for the repair of fences (*g*).

Where, however, there was strong and uniform evidence that the castle of A. had for two centuries past formed part of the hundred of Broxtowe, the court held that the mention in Domesday Book of the town of A. previously to the enumeration of the hundreds in the county, and inquisitions taken by jurors of the town of A. upon deaths

(*b*) *Stone* v. *Clarke*, 1 Metc. 378 ; *Corkill* v. *Landers*, 44 Barb. (N.Y.) 218.

(*c*) *Duke of Beaufort* v. *Mayor of Swansea*, 3 Exch. 413 ; *Johnson* v. *Barnes*, L. R. 7 C. P. 552 ; L. R. 8 C. P. 527.

(*d*) *Duke of Beaufort* v. *Mayor of Swansea*, *supra* ; *Attorney-General* v. *Jones*, 2 H. & C. 347 ; *L'Estrange* v. *Rowe*, 4 F. & F. 1048.

(*e*) *Marquis of Donegall* v. *Lord Templemore*, 9 Ir. C. L. R. 374 ; *In re Belfast Dock Act*, 1 Ir. Eq. Rep. 128.

(*f*) *Calmady* v. *Rowe*, 6 C. B. 861.

(*g*) *Livingston* v. *Ten Broeck*, 16 Johns. (N.Y.) 14 ; *Waterpark* v. *Fennell*, 7 H. L. Cas. 650, 684 ; *Attorney-General* v. *Drummond*, 1 Dr. & W. 353 ; 2 H. L. Cas. 837 ; *Baird* v. *Fortune*, 7 Jur. (N.S.) 926 ; *Morgan* v. *Crawshay*, L. R. 5 H. L. 304 ; *Clyde Navigation Trustees* v. *Laird*, 8 App. Cas. 658.

in the castle of A., and a charter erecting the town of A. into a county of itself, with the special exception of the castle of A., were not so clearly inconsistent with the long-continued modern usage and reputation as to negative the inference that the castle was part of the hundred (*h*).

EVIDENCE OF REPUTATION.—Boundaries may, it has been said, be proved by hearsay testimony,—the reason commonly given being that landmarks formed of perishable materials, frequently pass away with the generation in which they were made, or by the improvement of the country, and from other causes are often destroyed, and it is important, therefore, in many cases that hearsay or reputation should be received to establish ancient boundaries (*i*). But the law of the admissibility of hearsay evidence on questions of boundary is more accurately stated (*k*) as being that, on the trial of issues of fact before a jury, hearsay evidence is to be excluded; but that there is an exception where a relaxation of the rule tends to the attainment of justice. One of these exceptions is where the question relates to matters of public or general interest,—matters in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, partly because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time,—whereby direct proof of their existence has been obliterated; and partly because, in local matters, in which the community are interested, all persons living in the neighbourhood are conversant,—common rights and liabilities being naturally talked of in public, and what is dropped

(*h*) *Newcastle* v. *Broxtowe*, 4 B. & Ad. 273.

(*i*) *Boardman* v. *Lessees of Ford and Reed*, 6 Peters (U.S.) 328, 341.

(*k*) *R.* v. *Bedfordshire*, 4 E. & B. 535, 541. See also *Morewood* v. *Wood*, *Outram* v. *Morewood*, 14 East, 327, 330.

Matter of General Interest.—See *Evans* v. *Merthyr Tydvil Urban Council*, [1899] 1 Ch. 241.

in conversation respecting them may be presumed to be true, because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy *reputation* may arise from the concurrence of many parties, unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of merely private interest; for respecting these, direct proof may be given, and no trustworthy reputation is likely to arise. And although a private interest should be involved with a matter of public interest, the reputation which otherwise would be clearly admissible in respect of the public right (or of the public liability) is not on that account excluded,—else the relaxation of the rule against the admission of hearsay evidence would often be found unavailing (*l*).

But in order to render declarations admissible as evidence of reputation, the declarations must have been made *ante litem motam* (*m*); and also there must have been a competent knowledge in the declarant (*n*),—which is the reason commonly assigned why evidence of reputation is not admitted in matters of mere *private* interest (*o*); actual inhabitancy in the place the boundaries of which are in dispute is, however, not necessary to render the evidence of the declarant admissible (*p*): Thus (*q*), where the question was one between two parishes and manors, as to whether a certain common was within the parish and manor of A., or within the parish and manor of B., evidence was admitted of what old persons then dead had been heard to say concerning the boundaries of the parishes and manors, though not as to particular facts or

(*l*) *Davies* v. *Lewis*, 2 Chitty, Rep. 535; *Doe* v. *Richards*, 2 Peake's N. P. 180.

(*m*) 1 Taylor on Evidence, 5th ed., 563—568.

(*n*) *Rogers* v. *Wood*, 2 B. & Ad. 245.

(*o*) 1 Taylor on Evidence, 5th ed., 554, 555.

(*p*) *Duke of Newcastle* v. *Broxtowe* (*Hundred*), 4 B. & Ad. 273.

(*q*) *Nicholls* v. *Parker*, 14 East, 331.

transactions,—and this, though the old persons were parishioners, and claimed rights of common in the waste, which would have been enlarged by their declarations, there not appearing to have been any dispute at the time the declarations were made respecting the rights of the persons making them,—at least no litigation pending, so that the declarants could not be considered as having it in view to make evidence for themselves by their statements. Also, in another case, evidence of reputation was admitted to show the boundaries between the new and the old land in a manor (*r*) ; and declarations of deceased persons as to the boundaries of a reputed manor have been admitted as evidence of reputation (*s*).

Again, where it appeared that, from the year 1698, down to the year 1858, N. had maintained its own poor, and had never been charged with the support of the poor of any other place ; and in 1858, the owner of a large estate in the parish of T. found among the title-deeds in his possession an agreement dated in 1698, purporting to be made between the then owner of N., on the one part, and several inhabitants of T., on behalf of the parish of T. on the other part, and by which it was recited that N. was part of T., and that it had been agreed that N. should maintain its own poor, and not be chargeable towards the poor-rate of the other part of the parish,—it was held that this agreement was admissible in evidence as an ancient document relating to the interests of all the estates in T., and that it was decisive evidence to show that N. was a part of the parish of T. ; and further that it was evidence also of reputation as to the extent of the parish, being a declaration by the deceased owner of N., and the other inhabitants of T. to that effect (*t*).

So, ancient orders of sessions, containing statements respecting boundaries, have been admitted as evidence of

(*r*) *Barnes* v. *Mawson*, 1 M. & S. 81.

(*s*) *Doe* v. *Sleeman*, 9 Q. B. 298 ; 15 L. J. Q. B. 338. See also *Curzon* v. *Lomax*, 5 Esp. 60.

(*t*) *R.* v. *Mytton*, 2 E. & E. 557.

reputation (*u*) ; but entries in parish books which recorded that the perambulations had taken a particular line have been rejected,—that being evidence of a particular fact, and not of general reputation (*x*).

Also, where the question was one of parish boundary, a book kept in the chapter-house of Salisbury, purporting to contain copies of leases granted by the dean and chapter, and their confirmation of leases granted by the bishop or the prebendaries, was put in evidence,—and it appearing that the book was open to the tenants of the manors belonging to the dean and chapter, and that many of the leases stated the district to be in the parish, it was thought the book was in the nature of a public document, and therefore admissible as evidence of reputation respecting the parish boundary (*y*). Again, where, upon an inquiry as to the true boundary between two parishes and counties, certain presentments of a manor court were offered in evidence, in one of which the boundary was set out,—the presentments, although in a mutilated state, were held admissible, the parts torn off appearing not to have contained any matter connected with the subject of the boundary (*z*).

So, evidence of reputation that a town extended to a certain point has been admitted, where old persons since deceased had declared such point to be the boundary, but so far as their declarations were as to a particular fact, they were rejected (*a*).

On the other hand, where the lord of a manor brought an action of trespass for wreck, and an ancient document was tendered in evidence to prove the lord's right to wreck, the document purporting to be the answers of certain tenants of the manor to questions by commissioners of survey appointed by the then lord, and the document

(*u*) *Newcastle* v. *Broxtowe*, 1 N. & M. 507 ; 4 B. & A. 273.
(*x*) *Taylor* v. *Devey*, 7 A. & E. 409.
(*y*) *Coombes* v. *Coether*, M. & M. 398.
(*z*) *Evans* v. *Rees*, 10 A. & E. 151.
(*a*) *Ireland* v. *Powell*, 7 A. & E. 555.

stating that the spot where the trespass was committed was within the boundaries of the manor, and that the lord was entitled to wreck within the manor,—the court held, that the document was admissible as evidence of the boundaries of the manor, but not as evidence of the lord's right to wreck,—such latter right not being a matter of public concern, or one respecting which the jurors had peculiar means of knowledge (*b*). In like manner where the question was, whether a certain waste was parcel of a certain farm, evidence of declarations of old persons deceased as to what was the ancient boundary of the waste belonging to the farm was rejected, the question not relating to the boundary of a parish or manor, but of a private estate (*c*). Also, where the question was whether a particular road was a public or a private road, hearsay evidence to the effect that a person, when a boy, planted a tree, saying that he did it to show the boundary of the road, was rejected, as being evidence concerning a particular fact (*d*). And, where the declarations of deceased tenants who had been entitled only to rights of common appendant over a waste were held inadmissible to prove that a certain spot was parcel of the waste their rights being of too *private* a nature to admit of declarations concerning them being received as evidence of reputation, it was stated that if the question had been one in which *all* the inhabitants of the manor, or *all* the tenants of the manor, had been interested, reputation from any deceased inhabitant or tenant, or even deceased resident in the manor, would have been admissible; and that if there had been a common law right for *every* tenant of the manor to have common on the wastes of it, reputation from any deceased tenant as to the extent of those wastes, —and therefore as to any particular land being waste of the manor,—would have been admissible, but that

(*b*) *Talbot* v. *Lewis*, 5 Tyr. 1; 1 C. M. & R. 495.

(*c*) *Clothier* v. *Chapman*, 14 East, 331.

(*d*) *R.* v. *Bliss*, 7 A. & E. 550. See also *R.* v. *Berger*, [1894] 1 Q. B. 823.

common appendant, however, was not the common right of all the tenants of a manor, but belonged only to each grantee, before the statute *Quia Emptores*, of arable land, by virtue of his individual grant and as an incident thereto (*e*). Nor will the mere fact that there are numerous tenants having common appendant over the wastes give to their rights a *public* character that will render declarations admissible as evidence of reputation (*f*).

But if it be shown, that the boundary of two private estates is identical with that of two hamlets or parishes, then evidence of reputation may be put in, just as much as if the boundary of the parishes or hamlets was the only matter in issue (*g*).

The declarations of deceased persons will, of course, in all cases be rejected, if the declarants are not proved to be dead at the time of the trial (*h*).

B. Value of verdicts, decrees, judgments, etc.—VERDICTS, DECREES, JUDGMENTS, AND OTHER ADJUDICATIONS UPON MATTERS OF A PUBLIC NATURE, are admissible as evidence, not precisely as reputation, but as the decisions of competent tribunals on the matters involved (*i*). And where the question related to the boundary between the manors of W. and O., and the plaintiff's case was that the boundary line between the two manors was a ridge of mountain from which the waters descended in opposite directions, it was held, that he might show (in support of this) that the boundary between the adjoining manor of I. and the manor of O. was the same mountain ridge, and that he might prove that fact by the finding of a jury

(*e*) *Dunraven* v. *Llewellyn*, 15 Q. B. 791, 809.

(*f*) *Dunraven* v. *Llewellyn*, 15 Q. B. 811; *Reed* v. *Jackson*, 1 East, 355; *Doe* d. *Didsbury* v. *Thomas*, 14 East, 323; *Williams* v. *Morgan*, 15 Q. B. 782.

(*g*) *Thomas* v. *Jenkins*, 6 A & E. 525; 1 N. & P. 588; *Brisco* v. *Lomax*, 8 A. & E. 213; 1 Taylor on Evidence, 5th ed., 553.

(*h*) *Buchanan* v. *Moore*, 10 Sargent & Rawle, Rep. 281; *R.* v. *Milton*, 1 C. & K. 58.

(*i*) *Lee* v. *Johnstone*, 1 L. R., Sc. App. 426.

summoned from the Duchy of Lancaster for the purpose of determining the boundary between the manors of I. and O., on the petition of certain former owners of I. and O., who had represented that the boundary was uncertain, and that suits were likely to grow between them (*k*).

BUT AWARDS ARE NOT LIKE VERDICTS,—so as to be admissible as evidence of reputation; for an award is but the opinion of the arbitrator, formed, not upon his own knowledge,—as declarations used by way of reputation commonly are,—but on the result of evidence laid before him, most probably in private, and formed also *post litem motam*, having none of the qualities upon which evidence of reputation rests. And if it be said, that the verdict of a jury is equally defective in those qualities, it is sufficient to reply, that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned. Moreover, the principle of those authorities is not clear enough to embrace an award (*l*).

But, of course, in a subsequent suit between the same parties, or those claiming through them, the award would be perfectly admissible,—not as hearsay at all, but as evidence properly so called (*m*).

C. Value of old leases and other ancient documents of a private character.—ANCIENT PATENTS AND INQUISITIONS have been admitted as evidence of reputation to show the extent of a navigable river (*n*).

(*k*) *Brisco* v. *Lomax*, 8 A. & E. 210, in which case it was said by LITTLEDALE, J.: "On a question of boundary, mere reputation is evidence. But I put this as a verdict, not as reputation. It is a trial by witnesses competent to speak to the fact. Now reputation being evidence, the verdict must be evidence . . . . ; and this though the former proceeding was between different parties. It is not a reputation; but *it is as good evidence as reputation*" (citing *Reed* v. *Jackson*, 1 East, 355).

(*l*) *Evans* v. *Rees*, 10 A. & E. 151; 2 P. & D. 627.

(*m*) *Breton* v. *Knight*, cited in Roscoe's Evidence at Nisi Prius, 10th ed., 182.

(*n*) *Donegall* v. *Templemore*, 9 Ir. C. L. R. 374; *In re Belfast Dock Act*, 1 Ir. Rep. 128.

ANCIENT LEASES, BOOKS OF ACCOUNT, ETC.—So, ancient leases are held properly to have been received as evidence of reputation, in a question of parish boundary ; and old books of account, containing evidence of the payment of parish rates, also may be admitted (*o*) ; and on the subject of admitting ancient leases as evidence it has been said that they have always been considered to be admissible as being evidence of acts of ownership, and that this is on the principle, that when at a distant period, as to which there is no more direct evidence available, you find a person claiming to be the owner of property, and willing to make himself responsible as lessor for the title to it, and another person willing to agree to give rent for the property, and to enter into a solemn engagement as a tenant of it, admitting his landlord's title, these circumstances are of themselves admissible as evidence of the title ; they are real transactions between man and man, not intelligible except on the footing of title, or at least an honest belief of title ; and the payment of rent under such a lease is a further and additional fact also admissible as evidence and on the same principle (*p*).

OLD LICENCES, in the nature of leases, are, in this particular, on the same footing as ancient leases ; and where some old licences were offered in evidence, it was said that there was no distinction between old licences and old leases that were always received in evidence in favour of those claiming under the lessors ; and that it was not necessary to prove payment under the licences, as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved (*q*).

However, to give any weight to old licences, it must, in general, be shown, that in later times payments have been made under licences of a similar character, or otherwise

(*o*) *Plaxton* v. *Dare*, 10 B. & C. 17 ; 5 M. & R. 1.

(*p*) *Bristow* v. *Cormican*, 3 App. Cas. 641.

(*q*) *Rogers* v. *Allen*, 1 Camp. 309.

that the lords of the manor exercised other acts of ownership which were acquiesced in: Thus, a possessory title in the plaintiffs to the foreshore was held sufficient as against a trespasser, without producing evidence sufficient to displace the title of the Crown; and the plaintiffs having produced some evidence of their title to the foreshore, the defendant was debarred from proving any acts of ownership by the Crown, except such as had been done with the knowledge of the plaintiffs; and it appearing that the portion of the beach which was covered with shingle varied according to the state of the wind and the tide, the Court held, that, as against a trespasser, the Crown grant of parcel of the foreshore was to be construed liberally, so as to embrace the whole beach covered with shingle, as well below as above high-water mark (*r*).

Upon the value and sufficiency of such a possessory title generally, it is said that a documentary title commencing with some person rightfully in possession, or who has an admitted or proved right to be in possession, and connecting itself with a plaintiff in an action of trespass, would, in the absence of any title in the defendant by adverse possession, be sufficient to maintain an action of trespass; and that there can be no doubt whatever that mere possession is sufficient against a person invading that possession, without himself having any title whatever,—as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser (*s*).

(*r*) *Hastings* v. *Ivall*, L. R. 19 Eq. 558.

(*s*) *Bristow* v. *Cormican*, 3 App. Cas. 641. See also *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770, 791, in which case the court held that a title to the foreshore was made out in the defendant, partly from baronial grant, and partly from acts of ownership, and it was said by Lord BLACKBURN that "Every act shown to have been done on any part of that tract by the barons or their agents, *which was not lawful unless the barons were owners of that spot on which it was done*, is evidence that they were in

So in a case regarding the river Blackwater, in Ireland, and which was an action for trespass to an alleged several fishery, the plaintiff's paper title (if the possession and enjoyment were consistent with it) afforded irresistible ground for a presumption that the fishery was put in issue before Magna Charta ; and, as evidence of possession and user, the plaintiff tendered, and the court admitted (*inter alia*) the proceedings in 1687 in a "possessory action," by the decree in which an injunction had been awarded, as against strangers to the defendant, to quiet the plaintiff's predecessors in title in the possession ; and upon this class of proof, it was remarked that possessory suits of this kind were not unfrequent in Ireland, and in England were formerly not unknown ; and that they were maintainable, not on proof of title (as to which neither party was concluded by the decree), but on proof of at least three years' possession before the filing of the bill (*t*) ; and that as to that, the decree was final between the parties, being in this respect unlike those orders of the Duchy Court of Lancaster, which as being merely interlocutory, and deciding nothing between the parties to the suit, the Court of Exchequer rejected as inadmissible (*u*). And it was also said that an adverse litigation, supported by proofs on both sides, and ending in a final decree,

possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances,—one very important circumstance being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. Also, all that tends to prove possession, as ownership of part of the tract, tends to prove ownership of the whole tract,—provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession proved was ; and the weight of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately."

(*t*) *Neill* v. *Devonshire*, 8 App. Cas. 135. See also *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593 ; *Blandy-Jenkins* v. *Dunraven*, [1899] 2 Ch. 121.

(*u*) *Pim* v. *Curell*, 6 M. & W. 234, 236.

comes within the category of *res gestæ*, and of "*declarations accompanying acts*," — quite as much as leases between parties under which rent has been paid, or any other ancient deeds or instruments relating to the exercise of a prescriptive right; and when a general public right is (whether affirmatively or negatively) involved, it is difficult to see why the reasons for which inquisitions are receivable should not be applicable to such an adjudication (*x*).

D. Value of old maps, etc. of a private character.— Private maps, purporting to show the boundaries between counties, towns, parishes, and manors, are admissible as evidence of reputation, provided they are found in the proper custody (*y*), and provided they appear to have been made by or from the relation of persons acquainted with the locality to which the maps relate, and to have been generally accepted as accurate (*z*): Thus, where, in order to show that a certain place was not in a certain county, a private map was produced by a witness, who had purchased it twelve or fourteen years before, and in whose custody it had ever since been, it was said that in one sense the map did come from proper custody because it was produced by one who bought it twelve years ago, but that the fact of its being in the custody of the party who had such lawful possession of it did not at all vouch for its authenticity, or that it was what it professed to be; and that the persons who made the map did not appear to have been deputed to make it by any persons interested in the question, or to have had any knowledge of their own on the subject, or to have been in any way connected with the district, so as to make it probable that they had such knowledge (*a*).

(*x*) *Neill* v. *Devonshire*, 8 App. Cas. 135.

(*y*) *Bishop of Meath* v. *Marquis of Winchester*, 3 Bing. N. C. 200—202; 10 Bligh, 462—464.

(*z*) 1 Taylor on Evidence, 5th ed., 558.

(*a*) *Hammond* v. *Bradstreet*, 10 Exch. 390. See also *Pipe* v. *Fulcher*, 1 E. & E. 111; *Pollard* v. *Scott*, Peake, N. P. 19.

But on the other hand, where a map of a parish was offered in evidence, and it was proved by the surveyor who made it, that thirty-four years before the trial he laid down the boundaries of the parish from the information of an old man, who went round and showed them to him, it was held that the map might properly be received as evidence of reputation,—the old man's death being first proved (*b*).

Moreover, as regards private maps and surveys generally, the rule is, that they are not receivable in evidence in the strict sense of the word, either for or against the parties making them (*c*),—although under particular circumstances they may be treated as declarations against proprietary interests, and receivable in evidence in the same manner as other such declarations; therefore where one seised of two manors, during his seisin thereof, caused a survey to be taken of one manor, which was afterwards alienated, and subsequently a dispute as to the boundaries arose between the lords of the respective manors, it was held that the survey might be given in evidence (*d*); again, as between two adjoining proprietors, a private map would be receivable in evidence where, at the time the map was made, the two adjoining properties belonged to the person under whom both parties derived their respective titles,—*and only in such a case* (*e*).

But a map annexed to a deed stands on the same footing as the description of parcels contained in the deed itself (*f*); and therefore, where lines are drawn on a map or plan, and are referred to in the deed,—the courses, distances, and other particulars appearing on such plan,

(*b*) *R.* v. *Milton*, 1 C. & K. 58.

(*c*) *Phillips* v. *Hudson*, L. R. 2 Ch. 243; *Pollard* v. *Scott*, Peake, N. P. 19; *Wilkinson* v. *Allott*, 3 Bro. P. C. 684; *Wakeman* v. *West*, 7 C. & P. 479.

(*d*) *Bridgman* v. *Jennings*, 1 Ld. Raym. 734; *Anon.*, 1 Str. 95.

(*e*) *Hughes* v. *Lakin*, 7 C. & P. 481.

(*f*) Starkie on Evidence, 473.

are to be as much regarded as the true description of the land conveyed (*g*). Also, the map on the back of a lease is part of the contract, and may, therefore, be given in evidence to show what was demised (*h*). It is, however, to be remembered, that a private map drawn upon or indorsed on or annexed to a deed is "a good servant but a bad master"; for it is but a convenient guide, towards arriving at the true parcels contained in the deed. Also, an old map found with the muniments of title, and which agreed with the boundaries as adjusted on an old purchase, was admitted in evidence (*i*); and where necessary, parol evidence will be admitted to identify a place referred to in a deed or other written document (*k*).

The map in an inclosure award appears to stand on the same footing as the map on a private deed, as between and among the parties to the inclosure, and their privies. But where, upon an indictment for obstructing a highway. the map on the inclosure award was produced to prove the boundaries of the highway, and it appeared that the defendant (the adjoining owner) was not party or privy to the inclosure proceedings, the map was inadmissible (*l*).

A tithe commutation map is not evidence of boundary, as between two persons adversely disputing their titles to the land in question (*m*).

E. Value of Crown surveys and extents.— Ancient surveys and extents, if produced from the proper custody, and proved to have been made under the proper authority, are receivable in evidence as public documents in ques-

(*g*) *Davis* v. *Rainsford*, 17 Mass. 207, 211.

(*h*) *Wakeman* v. *West*, 7 C. & P. 480; *Lyle* v. *Richards*, L. R. 1 H. L. App. 222.

(*i*) *Yates* v. *Harris*, Gilb. on Evidence, 70.

(*k*) *Hodges* v. *Horsfall*, 1 Russ. & My. 116; *Climan* v. *Cooke*, 1 Sch. & Lef. 32.

(*l*) *R.* v. *Berger*, [1894] 1 Q. B. 823.

(*m*) *Wilberforce* v. *Hearfield*, 5 Ch. D. 709.

tions of boundary (*n*) : Thus, an ancient extent of Crown lands, found in the office of land revenue records, and purporting to have been made by the steward of the Crown lands, was held to be evidence of the title of the Crown to the property which was mentioned therein, —being property which the extent stated to have been purchased by the Crown of a subject (*o*). But where an instrument was offered in evidence which purported to be the survey of a manor at one time parcel of the Duchy of Lancaster ; and the instrument was produced from the office of the duchy, and purported to have been taken by the deputy of the surveyor-general of the duchy, by authority of letters of deputation to him, and by the oaths and presentment of the tenants of the manor, whose names were subscribed, but no other authority for taking the survey was proved,—it was held, that the instrument, although it purported to contain a description of the parcels and a statement of the customs of the manor, was inadmissible on a question relating to the boundaries of the manor,—*scilicet*, because it was not a survey authorised by the statute *Extenta Manerii*, 4 Edw. 1, stat. 1, which statute gives no power to define the boundaries of manors (*p*).

But an ancient extent or survey made under the due authority in that behalf will be admissible in evidence although the commission under which it was made has been lost (*q*), if it be proved to have been made under due authority, and that the commission therefor was lost, and that the extent or survey comes from the proper custody : Thus, where it appeared that, in the reign of Charles I. the Crown granted in fee farm "a messuage, and escheat lands and tenements, containing by estimation 112 acres, situate in the vill of K., now or late in the

(*n*) 2 Taylor on Evidence, 4th ed., 1329 ; Starkie on Evidence, 287, 289. See also *Evans* v. *Merthyr Tydvil Urban Council*, [1899] 1 Ch. 241.

(*o*) *Doe* v. *Roberts*, 13 M. & W. 520. See also *Carnarvon* v. *Villebois*, 13 M. & W. 313 ; *Freeman* v. *Read*, 4 B. & S. 174.

(*p*) *Evans* v. *Taylor*, 7 A. & E. 617 ; 3 N. & P. 174.

(*q*) *Rowe* v. *Brenton*, 8 B. & C. 747.

occupation or tenure of D.,"—in an action of replevin upon a distress made for the rent of a farm called Plas Bach, the defendant, for the purpose of proving that Plas Bach was parcel of the 112 acres out of which the rent issued, tendered in evidence a presentment from the office of Land Revenue Records made in the eleventh year of the reign of Queen Elizabeth, and in which presentment lands called y Plas Baghe were mentioned as being in the township or vill of K., and in the occupation of D.,—it was held, that the presentment was no more than a survey taken by a private individual for his own purposes, and therefore could not be received in evidence as a public document,—although (if it had been signed by the jury) it might have been evidence of reputation as to the boundary of the vill (*r*); so, where, in support of an alleged customary payment in the nature of a wayleave rent for all coal gotten within the manor and exported, the plaintiff tendered in evidence a book purporting to be a survey taken in the year 1650 (after the manor had been granted to Oliver Cromwell), and purporting to have been taken by virtue of a commission to certain persons named in the survey, and which commission purported to have been given by Oliver Cromwell, Lord General of the Parliamentary Forces; and the book contained what purported to be a presentment by the homage jury to the effect that 4*d.* was due unto the lord for every wey of coals transported out of the lordship; but it appeared that the presentment was not signed by the jury, and no authority for the survey was shown,—the court held the survey to be inadmissible in evidence, either as a public document, or as evidence of reputation (*s*). And it may be said, generally, that the old survey books of a manor, in order to be received in evidence, must have been signed by the tenants (*t*); or else it must be shown that they

(*r*) *Daniel* v. *Wilkin*, 7 Exch. 429.

(*s*) *Beaufort* v. *Smith*, 4 Exch. 450.

(*t*) *Evans* v. *Taylor*, 7 A. & E. 617; *Smith* v. *Earl Brownlow*, L. R. 9 Eq. 241.

were made at a court of survey; and otherwise they are merely private memorials (*u*).

F. Value of ecclesiastical terriers, etc.—Ecclesiastical terriers, containing a detail of the temporal possessions of the church in every parish, made from time to time by virtue of the 87th canon and directed to be kept in the bishop's or archdeacon's registry, or occasionally in the chest of the parish church, are receivable in evidence, provided they come from the proper custody. And, generally, all old terriers or surveys of a manor, whether ecclesiastical or temporal, may be given in evidence, provided they come from the proper custody,—for often there can be no other way of ascertaining the old tenures or boundaries.

But a terrier of glebe lands is not evidence *for* the parson unless it be signed by the churchwardens as well as the parson or then if the churchwardens be of the parson's nomination; and even when signed by both churchwardens and parson, such a terrier deserves very little credit unless it is signed also by the substantial inhabitants of the parish: of course, however, it is evidence *against* the parson (*x*). A terrier of the parish which is not signed by any parish official or person bearing any public character in the parish is not evidence (*y*).

Under an issue to try the boundaries of a parish, papers handed over to the incumbent by the representatives of his predecessor, as papers belonging to the parish and found in the late incumbent's possession, will be admitted, without requiring any proof from the predecessor's representatives as to how the papers came into their custody (*y*).

G. Proceedings before the Tithe Commissioners and Board of Agriculture and Fisheries.—The proceedings of the Tithe Commissioners (if properly authen-

(*u*) 12 Vin. Abr. A. b. 15, § 12; Stark. on Evidence, 473.

(*x*) Buller N. P. 248; *Atkins* v. *Hatton*, 2 Anstr. 387; *Carr* v. *Mostyn*, 5 Exch. 69.

(*y*) *Earl* v. *Lewis*, 4 Esp. 1.

ticated, that is to say, all copies of such proceedings, certified under the seal of the commissioners) are, by the Tithe Commutation Acts (*z*) made receivable in evidence; and under the Board of Agriculture Act, 1889 (*a*), copies of the Board's proceedings, under the seal of the Board, are receivable in evidence.

H. Domesday book.—Domesday book, as being a public inquisition, is admissible as evidence of boundaries. This book, which is the most ancient inquisition extant, was compiled a few years after the Norman Conquest by certain commissioners, styled the Justiciaries of the King, upon the oaths of the sheriffs, the lords of manors, the presbyters of churches, the reeves of hundreds, and the bailiffs of villages, together with six villans from every village; and the book contains a general survey of all the counties in England, except the four northern, and specifies the name and local position of every place, its possessor in the time of King Edward the Confessor, and its possessor at the time of the survey, together with (among other particulars) the number of hides of land in the manor, the number of carrucates in the demesne, the quantity of wood, meadow, and pasture land, etc., etc. And although by reason of the many changes which have happened during the years that have elapsed since its compilation, these descriptions no longer hold good, the book is still of the greatest utility,—as well as of the highest authority,—in the matter of boundaries.

I. The Down Survey and the Ordnance Survey.—The Down Survey, as regards Ireland, is also admissible evidence of boundary,—being made so by the statutes 14 & 15 Car. 2, c. 2, and 17 & 18 Car. 2, c. 2, s. 5; and it is conclusive as regards the boundaries between the lands apportioned among the original Irish and the lands

(*z*) 6 & 7 Will. 4, c. 71, s. 2. See also *Gifford* v. *Williams*, 38 L. J. Ch. 598.

(*a*) 52 & 53 Vict. c. 30; 3 Edw. 7, c. 31.

apportioned to the English and Scotch settlers. But the Ordnance Survey (Ireland) is not admissible as evidence of boundaries (*b*).

J. Declarations of deceased persons against their own interest.—Declarations of a deceased lord of the manor, as to the extent of the wastes of the manor, are admissible in evidence, if and so far as they are made against interest, but not otherwise (*c*): Thus, where the defendant had, in a chancery suit, made certain admissions with respect to boundary, and the boundaries again came into question in an action at law, the admissions were read against him, although the plaintiff was a stranger (*d*); but, of course, admissions of that character, and so made, are not conclusive against the defendant.

Entries by deceased stewards and others, charging themselves with the receipt of money on behalf of their employers, may or may not be,—but, in general, they are,—admissible in evidence in questions of boundary (*e*).

K. Extracts from land tax or poor-rate assessments. — Extracts from the land tax or poor-rate assessments, being evidence of seisin, have also been admitted in questions of boundary (*f*).

L. Perambulations and other acts of ownership.—As in boundary questions acts of ownership are in all ways receivable in evidence (*g*), perambulations by the lord of the manor over certain portions of the waste, shown to

(*b*) *Tisdall* v. *Parnell*, 14 Ir. C. L. R. 1; *Alcock* v. *Cooke*, Bing. 340.

(*c*) *Crease* v. *Barrett*, 1 C. M. & R. 919; *R.* v. *Exeter Governors*, L. R. 4 Q. B. 341; *Taylor* v. *Witham*, 3 Ch. D. 605.

(*d*) *Richards* v. *Morgan*, 4 B. & S. 641.

(*e*) See Cole on Ejectment, 234.

(*f*) *Doe* v. *Arkwright*, 2 A. & E. 182; *Doe* v. *Seaton*, 2 A. & E. 171; *Doe* v. *Cartwright*, 1 C. & P. 218; Cole on Ejectment, 249.

(*g*) *Curzon* v. *Lomax*, 5 Esp. 60; *Bute* v. *Lewis*, 15 W. R. 479.

include the land in question, will be evidence of an assertion of ownership by the lord, where the question is whether certain land is part of the plaintiff's estate or is part of the waste of the manor,—and that, although no one on behalf of the plaintiff was present at the perambulations (*h*). Therefore, for the preservation of boundaries, it is expedient frequently to ascertain and set them out by referring to the ancient monuments and marks, and by (in effect) perambulating the boundaries in the presence of youthful persons as witnesses (*i*) ; and this species of perambulation may also prove effective to perpetuate the evidence of admitted boundaries, especially if made in the presence of the adjoining proprietors ; but whether it would operate (by a species of adverse possession) to make a boundary where admittedly none existed before, is the subject of very considerable doubt (*k*).

Moreover, where the dispute related to the ownership of a portion of the bed of a stream, flowing between the plaintiff's farm and the defendant's farm, its source being at some distance from both,—and the plaintiff contended that the whole of the bed of the river adjacent to his farm belonged to him, while the defendant claimed it *usque ad medium filum aquæ ;* and it appeared that the plaintiff's farm extended a greater distance down the stream than the farm of the defendant on the opposite side ; and evidence was brought forward to show that lower down, and opposite another farm belonging to C., the plaintiff was the undisputed owner of the whole bed of the river,—this evidence consisting of acts of ownership exercised by the plaintiff upon the bed of the river close to C.'s farm, and of repairs done by the plaintiff

(*h*) *Woolway* v. *Rowe*, 1 A. & E. 115 ; *Malcolmson* v. *O'Dea*, 10 H. L. 593, 614 ; *Tisdall* v. *Parnell*, 14 Ir. C. L. R. 23 ; Hale, De Jure Maris, 35.

(*i*) 1 Chitty, Gen. Prac. 196, 455.

(*k*) *Seddon* v. *Smith*, 36 L. T. (N.S.) 168 ; *Cubitt* v. *Maxse*, L. R. 8 C. P. 704 ; 2 Bro. N. C. 102 ; 5 Bing. 332.

to a fence which divided C.'s farm from the river and which was a continuation of the fence on the defendant's land,—and this evidence was rejected,—upon a new trial being moved for, on the ground of the improper rejection of the evidence, the judgment of the court (*l*) was that the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river adjoining the plaintiff's land, was admissible in evidence,—on the ground that they were such acts as might reasonably lead to the inference that the entire hedge and bed of the river belonged to the plaintiff. And it was said that ownership might be proved by proof of possession, which could be shown only by acts of ownership; but that it was impossible, in the nature of things, to confine the evidence to one precise spot; and evidence might therefore be given of acts done on other parts, provided there was such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute must belong to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the close,—the ownership of one part giving rise to the reasonable inference that the other parts belong to the same person; and the same rule is applicable to a wood which is not inclosed by any fence,—*scilicet*, if you prove the cutting of timber in one part (*m*). And the like rule and reasoning are applicable also to a continuous hedge,—subject, of course, always to be rebutted by contrary evidence.

(*l*) *Jones* v. *Williams*, 2 M. & W. 326. See also *Marquis of Donegall* v. *Lord Templemore*, 9 Ir. C. L. R. 374; *Duke of Devonshire* v. *Hodnett*, 1 Hud. & B. 322; *In re Belfast Dock Act*, Ir. Eq. R. 142; *Bristow* v. *Cormican*, 3 App. Cas. 461.

(*m*) **Acts of ownership.**—See, generally, *Stanley* v. *White*, 14 East, 332; *Doe* v. *Kemp*, 2 Br. N. C. 108; *Tuthill* v. *West Ham Local Board*, L. R. 8 C. P. 447; *R.* v. *United Kingdom Telegraph Co.*, 31 L. J. M. C. 166.

But although acts done upon parts of a district of land may be evidence of the ownership and possession of the whole of the district, yet as regards lands within a disputed boundary acts of ownership by either party outside the boundary are no evidence of title to the lands within (*n*).

M. Evidence of the identity of copyholds where the modern descriptions do not correspond with the old descriptions.—As regards the boundaries of copyhold lands, it is frequently impossible to ascertain the exact boundaries by their old descriptions,—the descriptions of copyhold property on the court rolls being,—or almost invariably being,—most vague and general, it is accordingly a rule among conveyancers, that the vendor is not bound to show how the description on the court roll is to be applied to the present state of the property, and he need prove only that the property has actually been enjoyed, and passed under that vague description for, say, sixty (or forty) years (*o*). But the entries on the court rolls,—as well of surrenders and of admissions as also of presentments,—are evidence as between the tenants, although the lord may or may not be entitled to use them, in proof of the boundaries of his manor (*p*).

N. Value of general history.—Tradition may prove the customs of the manor,—for all purposes as between the copyhold or customary tenants of the manor (*q*). And it appears, that, as regards the boundaries of counties generally (*r*), courts will take judicial notice of the general division of the kingdom into counties,—because

(*n*) *Clark* v. *Elphinstone*, 6 App. Cas. 164.

(*o*) *Long* v. *Collier*, 4 Russ. 276.

(*p*) *Irwin* v. *Simpson*, 7 Bro. P. C. 317; Bull. N. P. 247; *Standen* v. *Christmas*, 10 Q. B. 135.

(*q*) *Doe* v. *Mason*, 3 Wils. 63; *Roe* v. *Parker*, 5 T. R. 26.

(*r*) *Deybel's Case*, 4 B. & Ald. 246; *Brune* v. *Thompson*, 2 Q. B. 791; 2 Inst. 557.

they are continually in the habit of directing their process to the sheriffs of the counties, and because they are mentioned in a great variety of Acts of Parliament,—but a court will not do this, either with respect to the local situation of the different places in each county, or with respect to the boundaries of counties, or the distances of one county from another. And where, in an action for disturbance of common, the boundaries of two manors came in question, and it was admitted that the two manors, and also the parishes of C. and Y., and the counties of B. and G., were coterminous, a county history which gave the boundary of the counties was held not admissible in evidence (*s*); for generally, although a book of general history may be given in evidence to prove a matter relating to the kingdom in general, or to ascertain ancient facts of a public nature (*t*), it cannot be given in evidence to prove either a particular custom or a private right (*u*).

(*s*) *Evans* v. *Getting*, 6 C. & P. 586; *White* v. *Beard*, 2 Curt. 492.
(*t*) *Read* v. *Bishop of Lincoln*, [1892] A. C. 644.
(*u*) Buller, N. P. 248.

CHAPTER XIII.

A. Remedies for injuries arising from neglect to make and maintain fences, and for other injuries arising in connection with fences, party walls, etc.— It is convenient to premise, that although it has for a long time ceased to be necessary to mention any form or cause of action in a writ of summons, yet the principles underlying and distinguishing the old forms of action respectively are still of essential importanee, in determining the nature of the remedy which is applicable to the particular injury.

Now the forms of action for injuries arising from the neglect to make and maintain fences, were trespass and case ; trespass being the proper form of action in which to sue where the injury was a direct one, thus where the land of A. was invaded by the cattle of B., an action of trespass would lie for the invasion ; and trespass would also lie, if rubbish was shot or laid so near a wall as that some of it would run against and damage the wall ; for the injury was, in this case also, considered a direct injury (*a*). But where the injury was not direct, but consequential, case was the proper remedy, and therefore, if A. brought an action against B. because the fences were down which B. was bound to repair, *per quod* the horses

(*a*) *Gregory* v. *Piper*, 9 B. & C. 591 ; *Reynolds* v. *Clarke*, 1 Str. 636.

of A. escaped and were killed, the action must have been in the form of case or of trespass on the case; so, if A. wrongfully broke the fences of B., *per quod* the cattle of C. escaped into B.'s land and were there distrained, C. might bring case against A. (*b*).

The party to sue in *trespass* for an injury to land was, in general, the party in the actual possession of the land; and, since his possession was good against any wrongdoer, he need not have shown his title as against a wrongdoer. Where, however, the injury to the land was of a permanent character, and so was an injury to the reversion as well, the reversioner, or landlord, might also sue in case (*c*), but he was required to allege his title.

The action for an injury arising from a defect of fences was to be brought against the *occupier*, and not against the owner; although, if the damage had resulted from the misfeasance of the owner, the party injured might, at his option, have sued either him or the occupier. A description, however, of the defendant as the "owner and proprietor," would not necessarily imply that he also was the "occupier" (*d*); but it was sufficient to allege in the declaration, that the defendant, being in possession and occupation of a close, etc., ought of right to have repaired the fences, etc. (*e*); and, in a plea justifying a trespass on the ground of defects in the fences which the plaintiff was bound to repair, it was sufficient also to say, that the plaintiff ought of right to have repaired, without setting out, in either case, how the liability arose (*f*).

(*b*) *Courtney* v. *Collett*, 1 Ld. Raym. 273.

(*c*) *Tucker* v. *Newman*, 11 A. & E. 40; *Shelfer and Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 2 Ch. 388.

(*d*) *Todd* v. *Flight*, 9 C. B. (N.S.) 377, 389; *Cheetham* v. *Hampson*, 4 T. R. 320; *Payne* v. *Rogers*, 2 H. B. 349; *Russell* v. *Shenton*, 3 Q. B. 449.

(*e*) 1 Salk. 335, 360; *Rider* v. *Smith*, 3 T. R. 768; *Boyle* v. *Tamlyn*, 6 B. & C. 333—338; 2 Chitty on Pleading, 7th ed., 592.

(*f*) 3 Chitty on Pleading, 7th ed., 366; Bullen & Leake, 3rd ed., p. 329.

It used to be no plea, and it would still be no defence, to allege a mere custom to have fences repaired; but the defendant must either have prescribed that such a one ought to have repaired (*g*), or else have relied upon some agreement or clause in an Inclosure Act or inclosure award under which the liability arose, and this would still be the law, because the right to have fences repaired cannot grow by *custom*.

A person, who has valuable crops upon lands adjoining a public highway, should take care to fence his land against the intrusion of cattle, which are being driven along the road (*h*); for if cattle in passage along the highway eat herbs or corn *raptim et sparsim* against the will of the owner, the trespass will be excused (*i*); and it has been held that if cattle in passage along a highway stray into an adjoining field, the trespass will be excused, if the owner of the cattle drive them out within a reasonable time (*k*).

If the plaintiff is bound to repair the fence between his own land and the defendant's, the defendant may justify entering the plaintiff's land to retake the cattle (*l*); and as gratuitous bailee of the cattle, he may justify, equally as if he were the absolute owner of the cattle (*m*). Also, if a man ought to inclose against a forest, and by defect of the fences the deer escape out of the forest into his land, the forester may justify entering to retake them (*n*). So where the plaintiff declared in case against the defendant, in consequence of the defect of fences which the defendant was bound to repair, *per quod* the plaintiff's horse escaped into the defendant's close, and was there killed by the

(*g*) 1 Vent. 97.

(*h*) *Miller* v. *Fandrye*, Poph. 161; Sir W. Jones, 131; *Dovaston* v. *Payne*, 2 H. Bl. 527; 3 Wils. 126.

(*i*) 2 Roll. Abr. 556, pl. 1; Com. Dig. Pl. 3, M. 31.

(*k*) *Goodwin* v. *Cheveley*, 4 H. & N. 631.

(*l*) Com. Dig. Pl. 3, M. 29; Vin. Abr. Trespass, l. a, 4.

(*m*) *Rooth* v. *Wilson*, 1 B. & Ald. 59.

(*n*) Vin. Abr. Trespass, l. a, 5; *contra* BRIAN, C.J., in Kelw. 30 b.

falling of a haystack, the damage was held not to be too remote (*o*).

Where a man is under no obligation to repair, and cattle trespass upon his close, he is justified in driving the cattle out into the highway and leaving them there; but if he is bound to repair, he must drive them back into the close from which in consequence of his own neglect they escaped (*p*): Thus, where certain turnpike trustees, by the licence or permission of B., broke down a fence between the land of B. and the land of A., which B. was bound to repair; and the trustees, in so doing, were acting altogether outside the authority of their Act of Parliament; and they did nothing towards replacing the fence,—it was held that the action was rightly brought against B. (*q*); but, *semble*, the trustees also might have been made liable (*r*).

To a plea of escape through defect of fences, the plaintiff may in his reply deny either the particular obligation to repair the defect, or the defendant's right to put his cattle in the close adjoining the *locus in quo*; or he may allege that the defendant drove or turned his cattle into the *locus in quo*, or that they were unruly and broke down the fence (*s*).

Also, where a man is under no obligation to repair, and his land is trespassed upon by the cattle of another, he may distrain them damage feasant; but if he was under an obligation to repair, he cannot distrain such cattle, until they have been levant and couchant, and actual notice has been given to the owner of the cattle to remove them (*t*).

The general rule being, in the case of joint torts, that judgment against one of the co-tortfeasors is a bar to a

(*o*) *Powell* v. *Salisbury*, 2 Y. & J. 391. See also *Rooth* v. *Wilson*, 1 B. & Ald. 59; *Lee* v. *Riley*, 18 C. B. (N.S.) 722.

(*p*) *Carruthers* v. *Hollis*, 8 A. & E. 113.

(*q*) *Winter* v. *Charter*, 3 Y. & J. 308.

(*r*) *Heugh* v. *Abergavenny*, 23 W. R. 40; *Howitt* v. *Nottingham and District Tramways Co.*, 12 Q. B. D. 167.

(*s*) 1 Chitty on Pleading, 622; and 3 Chitty on Pleading, 849.

(*t*) 2 Wms. Saunders, 285, n. 4; 289, n. 7.

second action for the same tort against any other of them, therefore, in an action against B. for taking away the plaintiff's post, it will be an absolutely good defence, if judgment for the same tort has been already recovered against A., a co-tortfeasor with B. (*u*).

Ejectment would lie, and now an action in the nature of ejectment will lie, to recover possession of a wall (*x*), at the suit of one co-owner of the wall against the other co-owner who has ousted him from the wall. And trespass will lie at the suit of one co-owner against the other, for an injury which falls short of ouster (*y*).

Formerly a person whose duty it was to keep up fences might, at the suit of the owner of the land next adjoining, have been compelled to fulfil his duty in this respect by a writ called a writ *De Curiâ Claudendâ*,—which was a writ of right, and lay only at the suit of one tenant in fee against another (*z*). The writ has now been abolished (*a*); but, of course, an action in the nature of the old writ is still available (*b*).

A mandamus will sometimes issue to enforce the repair of fences,—*e.g.*, where there is a public body existing by force of some statute, which imposes upon it the duty to fence, as happens in the case of highways, turnpike roads, inclosures, etc. (*c*).

B. Remedies in the case of a wrongful confusion of boundaries and for the ascertainment of confused boundaries.—AT CIVIL LAW.—With reference to boundaries, and the remedies for the ascertainment thereof when confused, and for the injury which arises from the

(*u*) *Martin* v. *Kennedy*, 2 B. & P. 70, 71; *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547.

(*x*) *Trotter* v. *Simpson*, 5 C. & P. 51. See also *Murly* v. *McDermott*, 4 A. & E. 138.

(*y*) *Matts* v. *Hawkins*, 5 Taunt. 20.

(*z*) F. N. B. 127; Vin. Abr. Fences; 1 Salk. 335.

(*a*) 3 & 4 Will. 4, c. 27, s. 36.

(*b*) *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

(*c*) *Bird* v. *Relph*, 2 A. & E. 782; Woolrych on Fences, 313.

wrongful confusion thereof, it may be mentioned that, by the Roman civil law, the *Actio Finium Regundorum*,—being the action which was available for the regulation of boundaries,—was founded upon an implied agreement between the adjacent proprietors to preserve the boundaries between their respective properties ; and the action lay at the suit of all persons who had an interest in the property (*d*) ; and there were certain officials, called *agri mensores*, appointed for the purpose of ascertaining the boundaries ; and, as the Romans had the most exact surveys showing most accurately not only the boundaries of contiguous estates, but even the hedges, olive trees, buildings, etc., the *agri mensor* experienced very little difficulty in ascertaining and settling a boundary or in supplying the required information for the judge to settle it ; and it appears that if the dispute could not otherwise be conveniently arranged, the judge might adjudicate, *i.e.*, set out, other land for the purpose (*e*).

Also, by the Code Napoléon, article 646, every proprietor might compel his neighbours to determine the boundaries of their contiguous estates,—and the determination was to be made at the common expense.

MODERN REMEDIES.—Adjoining proprietors may enter into a parol agreement for the friendly settlement of any dispute or uncertainty as to the boundaries between their respective estates, an agreement of this kind not being within the Statute of Frauds : for, a settlement of boundaries is not an alienation, because if fairly made without collusion, the boundaries as settled are presumed to be the true ancient or original boundaries (*f*) ; and the agreement merely recognises and confirms the titles of the respective parties to the lands of which they are respectively the

(*d*) Story on Equity, § 614.

(*e*) Colquhoun's Summary, § 2179.

(*f*) *Penn* v. *Baltimore*, 1 Ves. sen. 444, 448. See also *Davison* v. *Kinsman*, 2 Nova Scotia, 1, 69 ; *Doe* v. *McCulloch*, 1 Kerr (New Bruns.), 460.

owners (*g*), and the settlement only distinguishes, and places beyond the reach of future doubt, the true line of separation between them, and will bind the parties to it not by way of transferring title from one to the other which the Statute of Frauds prohibits, but operating by way of estoppel. Where, however, there is no dispute or uncertainty, an agreement to change or establish a boundary line must be in writing, as the effect of the settlement will be to pass title (*h*). Provided the parties to be affected by the judgment or decree are within the jurisdiction (*i*), an agreement to settle a disputed boundary may be decreed to be specifically performed by English Courts (*k*), and this, notwithstanding that the articles of agreement are executed in England, while the disputed boundaries are elsewhere, such an agreement not being without consideration, for the settling boundaries and peace and quiet is a mutual consideration on each side, which supports a suit for performance of the agreement. Moreover, awards and agreements by which boundaries have been settled will be confirmed by the courts where necessary. Apart, however, from agreement, there is no provision in the English law requiring neighbours to settle *inter se* the boundaries between their respective properties. And a court of law (as contradistinguished from a court of equity) could give but inadequate relief in the matter of disputed boundaries; for it had no power to grant a commission to set out the boundaries, and no power to establish old boundaries or to direct intermingled lands to be separated, or an equivalent to be set out, or old inclosures to be restored. In fact, the power of the court was limited to directing possession to be given after the land in dispute had been recovered in ejectment (*l*); and

(*g*) *Davis* v. *Townsend*, 10 Barb. (N.Y.), 333, 346.
(*h*) *Vosburgh* v. *Teator*, 32 N.Y. 561.
(*i*) 1 Story on Equity, §§ 743, 744.
(*k*) *Penn* v. *Baltimore*, 1 Ves. sen. 444.
(*l*) *Att.-Gen.* v. *St. Aubyn*, Wightw. 229.

the judgment in ejectment not ascertaining by metes and bounds the land recovered, if a plaintiff succeeded in his ejectment,—say, for certain freehold lands, and it happened that those lands were intermixed with copyholds, his judgment remained in effect inoperative, unless and until he had ascertained and distinguished the freeholds from the copyholds (*m*).

And in consequence apparently of,—or at all events, in consequence partly of,—the inadequacy and other the inconveniences of the remedy at law, the courts of equity assumed jurisdiction with referenee to disputed boundaries, the probable origin of the jurisdiction being that there were two writs in the register concerning the adjustment of controverted boundaries, the one called the writ *de rationabilibus divisis* (*n*), and the other the writ *de perambulatione faciendâ* (*o*), both of them founded on consent of the parties, which was also the ground on which first the jurisdiction in equity was exercised; and that the next step was to grant the commission on the application of one party who showed not only that there was a confusion of boundaries detrimental to his interests, but also that he had an *equitable* ground for obtaining a commission, such as that a tenant or copyholder had destroyed or not preserved the boundaries between his own property and that of his lessor or lord,—and to

(*m*) *Hardcastle* v. *Shafto*, 1 Anstr. 184; *Hicks* v. *Hastings*, 3 K. & J. 705; *King* v. *Armstrong*, 2 Ir. Rep. C. L. 475; *Doe* v. *Parry*, 13 M. & W. 356.

(*n*) The writ *de rationabilibus divisis* (abolished by 3 and 4 Will. 4 c. 27, s. 36), lay properly where two men had lands in divers towns or hamlets,—so that the one was seised of the land in the one town or hamlet, and the other of the land in the other town or hamlet,—and they did not know the bounds of the towns or hamlets, or which was the land of the one and which was the land of the other.

(*o*) The writ *de perambulatione faciendâ* (also abolished by 3 & 4 Will. 4, c. 27), lay where parties were in doubt of the bounds of their lordships or towns; in which case, they might by assent sue out this writ, directed unto the sheriff, to make the perambulation, and to set the boundaries and limits between them in certainty; and this perambulation so made by assent, bound the parties and their heirs.

its exercise on such equitable ground, no objection has ever been made (*p*).

Moreover, where the defendants were the proprietors of the manor of Epping, and also of certain freehold lands adjoining thereto, but lying in the manor of Waltham, and the plaintiff was the proprietor of the manor of Waltham, the boundary line of the two manors passing through the defendants' park ; and the bill alleged that the defendants had cut down and destroyed the boundary marks between the two manors, and prayed for a commission to issue, in order to set out and fix the boundaries between the two manors,—the defendants in no way consenting to the exercise of the jurisdiction,—the bill was dismissed because no precedent was produced to show that the Court could entertain a bill of that nature, since the Court had no power to fix the boundaries of legal estates, unless some equity was superinduced by the act of the parties, and, further, had no power to issue commissions as of course (*q*).

And the Court has in fact always experienced very great difficulty in granting the commission, as between independent adjoining owners : Thus, it has been denied that a court of equity can interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property should be decided (*r*). In some cases, it is true, the Court appears to have granted commissions or directed issues, on no other apparent ground than that the boundaries of manors were in controversy (*s*), thus, where a bill was brought to settle the boundaries between the manors of D. and S., of which the plaintiff and defendant were respectively the lords, the matter was sent to law for trial, and was there determined,—the bill being in the meantime retained in

(*p*) *Speer* v. *Crawter*, 2 Meri. 410.

(*q*) *Wake* v. *Conyers*, 1 Eden, 331 ; 2 Cox, 360.

(*r*) *Speer* v. *Crawter*, 2 Meri. 410.

(*s*) *Godfrey* v. *Littel*, Tamlyn, 230, 234.

equity,—but the result of the trial or trials having been that the plaintiff was wholly in the wrong, his bill was in the end dismissed with costs (*t*).

A commission will not issue to attain a remote consequential advantage; therefore, where a bill was brought by a rector principally on account of tithes, and incidentally to have a commission to settle the boundaries of the parish and glebe-lands, the commission was refused because the plaintiff asked for a commission to ascertain the boundaries of the parish,—upon the presumption that all the land which was found within those boundaries would be titheable to him: this was indeed a *primâ facie* inference, but by no means conclusive; and it was said that there was no instance of the Court ever granting a commission, in order to attain a remote consequential advantage (*u*).

Moreover, a commission will not issue,—at least, as between adverse independent proprietors,—unless it first be shown that, without the assistance of the court, the boundaries cannot be found. Therefore, where it appeared that A. (the predecessor in title of the plaintiff) was entitled to the fee simple in four acres of land part of a field containing about five acres, and that the remaining one acre belonged to the Crown, and had been demised for a term of ninety-nine years to a tenant, whose interest A. had purchased; and that in 1805 the lease terminated, and the defendant purchased the share and interest of the Crown in the one acre and, through some mistake on the part of A.'s tenant, was let into possession of the whole field, and had since continued to hold, refusing to set out the portion of the field belonging to the plaintiff, or to make the plaintiff any compensation, it was said upon a bill to obtain (amongst other things) a commission to ascertain the boundaries, and for partition, that, in every

(*t*) *Metcalfe* v. *Beckwith*, 2 P. Wms. 376. See also *O'Hara* v. *Strange*, 11 Ir. E. Rep. 262; *Fitzgerald* v. *Lord Norbury*, 1 Jones, 557; *Harmood* v. *Oglander*, 6 Ves. 225; *Geast* v. *Barker*, 2 Bro. C.C. 61; *Curtis* v. *Curtis*, 2 Bro. C. C. 620, 628; *Duke of Leeds* v. *New Radnor* (*Corporation*), 2 Bro. C. C. 338.

(*u*) *Atkins* v. *Hatton*, 2 Anstr. 386.

bill for a commission to ascertain boundaries, it was first necessary to show that, without the assistance of the Court, the boundaries could not be found and the commission was refused (*x*).

The court would not, however, refuse to issue the commission, merely because the confusion had arisen through the neglect of the party seeking the relief, if the case was in its other circumstances proper for a commission to issue: Thus, where the testatrix by her will had appointed the manor of W. to certain uses under which the plaintiff eventually became entitled as tenant in tail in possession, and had devised her residuary real estate to trustees upon trust to sell; and the trustees sold,—the abstract of title showing that parcel of the manor had been wrongly included in the sale,—so that

(*x*) *Miller* v. *Warmington*, 1 Jac. & W. 484, in which case it was said, *per* PLUMER, M.R.: "Here the answer admits that the whole field has been held together; the bill states that there are no marks and bounds to distinguish one part from the other; and though there may be none that are visible and apparent to the eye, yet it does not follow that, by addressing themselves to old people acquainted with the place or by examining the tenant, they might not separate the two parts. But even if the difficulty of finding the boundaries were established, it is clear the plaintiff does not stand in a predicament that gives him a right to apply for a commission; for this is a case of persons claiming by adverse title; there is no connection between them, to serve as a foundation for the court to proceed on in ordering a commission." *Speer* v. *Crawter*, 2 Meri. 410, has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. "But the court will not interfere between independent proprietors; and confusion of boundaries *per se* is no ground to support such a bill. . . . And as regards the rest of the bill, that which asks for a commission in the nature of a writ of partition,—partition can only be between joint tenants, tenants in common, or coparceners, the principle upon which the relief proceeds being the unity and entirety of the possession of each,—hence the plea of *non tenet insimul* is a good defence to an action for partition. . . . Partition is not given for any such reason as confusion of boundaries, but from the nature of the interest of the parties."

the purchaser had full notice of the plaintiff's title to that part; and it appeared that the error of the trustees had arisen from the boundaries having been confused by the plaintiff's predecessor in title,—the court held, that the plaintiff was not thereby precluded in equity from establishing his title to a share of the land, and an inquiry was directed to ascertain the boundaries (*y*).

The court will issue the commission, where, by reason of the confusion of the boundaries, a distress for rent has become difficult or impossible (*z*): Therefore, if a tenant has wilfully confused the boundaries, in order to prevent a distress, the commission will issue at the suit of the lord to ascertain them (*a*),—and that, whether the rent is a rent-service or a rent-charge (*b*); also where, by mere length of time, it has become impossible to know out of what particular lands ancient quit-rents are issuable, the courts of equity have exercised the jurisdiction, and have constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents and payment of the same for the future (*c*). And it appears that where a man is entitled to rent out of lands, and through process of time the remedy at law is lost or becomes very difficult, the court of equity will interfere and give relief, upon the foundation only of payment of the rent for a long time (*d*); but all the terre-tenants of the lands out of which the rent issues must be brought before the court, in order that the court may make a complete decree (*e*). And the specific grounds

(*y*) *Hicks* v. *Hastings*, 3 K. & J. 701. See also *Clarke* v. *Yonge*, 5 Beav. 523.

(*z*) Mitford, Eq. Pl. 117.

(*a*) *Bouverie* v. *Prentice*, 1 Bro. C. C. 201.

(*b*) *Bowman* v. *Yeat*, 1 Ch. Cas. 146; *Searle* v. *Cooke*, 43 Ch. D. 519.

(*c*) *Duke of Bridgewater* v. *Edwards*, 6 Bro. P. C. 368.

(*d*) *Benson* v. *Baldwyn*, 1 Atk. 598.

(*e*) *Collett* v. *Jaques*, 1 Ch. Cas. 120; *Cocks* v. *Foley*, 1 Vern. 359; *Harding* v. *Countess of Suffolk*, 1 Ch. Rep. 61, 63; *Duke of Leeds* v. *Corporation of New Radnor*, 2 Bro. P. C. 338—518;

for the relief, must be clearly stated in the bill; for otherwise a lord might be very vexatious to tenants and make them spend in their necessary defence more than three times the value of the rent (*f*). And, before the relief will be given, it must be clearly shown, that the tenant of the land out of which the rent issues is in possession of some part of the land chargeable with it (*g*). Usually, also, it must be shown, of course, that the rent is a continuing rent,—which (in the case of alleged perpetual rents) is often a difficult matter to prove; and for that reason, it has been provided, as regards rents due to charities, that in actions by the charity commissioners for such rents the payment of such rents for twelve consecutive years shall be *primâ facie* conclusive that the rents are perpetual rents (*h*).

Moreover, to sustain a bill of this nature, it is necessary that the plaintiff should establish a clear title to some land in the possession of the defendant; and, accordingly, the court will not direct an issue to try the title, if it be left in doubt upon the evidence in the cause (*i*): Thus, where a bill was brought to ascertain and set out the boundaries of lands belonging to the plaintiff, under whom the defendant had held as lessee for a number of years, *on the ground that the defendant had during the lease confused his own lands with those of the plaintiff*, so that they could not be distinguished,—it being satisfactorily proved that part of the land in the possession of the defendant belonged to the plaintiff, the bill was dismissed (*k*). But *when the court is satisfied with the plaintiff's title, and that he has an equitable ground*

Duke of Leeds v. *Powell*, 1 Ves. sen. 172; *Duke of Leeds* v. *Strafford*, 4 Ves. 180; *North* v. *Earl of Strafford*, 3 P. Wms. 148; *Bowman* v. *Yeat*, 1 Ch. Cas. 146.

(*f*) *Holder* v. *Chambrey*, 3 P. Wms. 256.

(*g*) *Basingstoke* (*Mayor*) v. *Bolton*, 1 Drew. 270; 3 Drew. 50.

(*h*) 54 & 55 Vict. c. 17, s. 5.

(*i*) *Godfrey* v. *Littel*, 1 R. & My. 59; 2 R. & My. 639 (citing *Bishop of Ely* v. *Kenrick*, Bunb. p. 322).

(*k*) *Godfrey* v. *Littel*, 1 R. & My. 59; 2 R. & My. 639.

for the assistance of the court, the authorities justify the affording of relief either by a commission or by directing an issue, as will best advance the justice of the particular case (*l*).

The commission would not, as a general rule, have issued save by consent, at the suit of the party who was responsible for the confusion (*m*); but by consent the jurisdiction would be assumed and exercised even in the absence of equitable considerations, but occasionally only (*n*).

A commission would issue, at suit of the Crown, in the case of an encroachment upon the shore or bed of the sea, or upon the bed of a tidal river (*o*); and a commission would issue, to settle the boundaries of part of a manor, if the plaintiff had established his title to the other part; for

(*l*) *Chapman* v. *Spencer*, Eq. Ca. Abr. 163 (A. 21); *Lord Teynham* v. *Herbert*, 2 Atk. 483; 2 Eq. Ab. 164; *Mayor of York* v. *Pilkington*, 1 Atk. 282; 2 Atk. 302; *Sayer* v. *Pierce*, 1 Ves. 232.

In *Boteler* v. *Spelman*, Rep. t. Finch, 96, where the suit was brought for the discovery of the metes and bounds of four acres of land belonging to the plaintiff, which had been leased to or occupied by the defendant and so had become mixed with the defendant's other lands,—by ploughing and other means, so that the plaintiff's and defendant's land could not be distinguished,—a commission was granted to set out the metes and bounds, and the yearly value thereof, and how long the defendant had held the same; and he was to pay the plaintiff for the occupation thereof. See also *Lethulier* v. *Lord Castlemain*, 1 Dick. 46; Select Chancery Cases, 60.

In *Bute* v. *Glamorganshire Canal Co.*, 1 Ph. 681, where the bill stated a system of gradual encroachments on the part of the defendants, the filling up of a ditch, and generally the obliteration of the boundaries; and further stated the necessity, if the court should not interfere, of bringing a great number of actions against different parties, in order to fix the boundaries and to establish the plaintiff's right,—it was held that there were sufficient grounds for a commission to issue.

(*m*) *O'Hara* v. *Strange*, 11 Ir. Eq. Rep. 262.

(*n*) *Winterton* v. *Egremont*, 2 Anstr. 392.

(*o*) *Attorney-General* v. *Chamberlaine*, 4 K. & J. 292; *Attorney-General* v. *St. Aubyn*, Wightw. 167; *Hicks* v. *Hastings*, 3 K. & J. 707.

that was in the nature of a partition (*p*). Also, a commission will issue, in order to save a multiplicity of suits, where one general right is claimed against a number of defendants, all of whose interests, although they are separate and distinct, yet are of such a nature that trying the right of one is trying the right of all (*q*) : Thus, where the lord of a manor filed a bill against more than thirty tenants of his manor,—freeholders, copyholders, and leaseholders,—who owed their rents, but had so confused their boundaries that he could not distrain for the rents, and he prayed a commission to ascertain the boundaries, a decree was made accordingly because the plaintiff claimed *one general right*, for the assertion of which it was necessary to ascertain the several tenements (*r*). But there is no common right of parishioners to the boundaries of a parish, therefore a commission will not issue to ascertain the boundaries between two parishes in a case where the ascertainment is desired for the purpose of settling a question as to the poor rates belonging to each parish (*s*).

Where a trustee confounds his *cestui que trust's* lands with his own, equity will issue a commission at the suit of the *cestui que trust* to distinguish his property from that of the trustee : Thus, where the defendant was in possession as beneficial owner of lands, both freehold and copyhold, and these lands were intermixed with other lands of which he was also in possession, but as trustee of a charity,—a commission was issued to distinguish and set out the charity lands from those of the defendant (*t*). Moreover, in favour of an execution creditor, the courts appear

(*p*) *Webb* v. *Banks*, 2 Eq. Ca. Abrid. 164, A. 30.

(*q*) *Wake* v. *Conyers*, 1 Eden, 331 ; *Phillips* v. *Hudson*, L. R. 2 Ch. 243.

(*r*) *Magdalen College* v. *Athill*, Mitford, Eq. Pl. 183. See also *Whaley* v. *Dawson*, 2 Sch. & Lef. 367, 370.

(*s*) *St. Luke's* v. *St. Leonard's*, 1 Bro. C. C. 40 ; 2 Anstr. 395. See also *Marquis of Bute* v. *Glamorganshire Canal Co.*, 1 Ph. 681 ; *Woolaston* v. *Wright*, 3 Anstr. 801 ; *Cowper* v. *Clarke*, 3 P. Wms. 157.

(*t*) *Attorney-General* v. *Bowyer*, 5 Ves. 300 ; 3 Ves. 714.

to consider the mere confusion of the boundaries to be sufficient, and a commission has been issued at the instance of an execution creditor and in aid of his writ of elegit, to set out lands that lay promiscuously (*u*).

Copyholders and leaseholders are equally under an obligation to preserve the boundaries of their respective tenements: Thus, where the plaintiff was lord of the manor, and the defendant and his ancestors had for many years past been possessed of compounded and uncompounded copyhold premises and of freehold lands within the manor, and the boundaries between the different estates had become confused, a commission issued to distinguish the copyhold lands from the freehold lands, and the uncompounded copyholds from the compounded copyholds, and to ascertain and set out the boundaries, and, if they could not be distinguished, to set out lands of the tenant of equal value (*x*).

Moreover, where a copyhold tenement had been enfranchised, and the boundaries had been confused prior to, and remained confused after, the enfranchisement, and the lord of the manor desired that the boundaries should be ascertained, in order that he might recover more readily the arrears of a certain rentcharge created on the enfranchisement, the court held that the enfranchised tenement was liable for the continuing confusion of the boundaries, because it was clear that, at the date of the enfranchisement, the court would have made an order, on the application of the lord, to ascertain the boundaries of the lands; and if that could not be done, to substitute other lands; and that being so, the only question was, as to the result of the

(*u*) *Mullineux* v. *Mullineux*, Toth. 39 (ed. 1649).

(*x*) *Leeds* v. *Strafford*, 4 Ves. 180, in which case it was said that it was "the duty of the tenant to keep the boundaries; and that is the foundation of the bill. The confusion ot the boundaries does not infer any negligence on the part of the lord; for the tenant is in possession of the land." See also *Rous* v. *Barker*, 4 Bro. P. C. 660; *Clayton* v. *Cookes*, 2 Atk. 449; *Wintle* v. *Carpenter*, Rep. t. Finch, 462; *Peckering* v. *Kimpton*, 5 Car. 2, Toth. 101; *Davenport* v. *Bromley*, Rep. t. Finch, 17; *Lord Abergavenny* v. *Thomas*, West, 649.

enfranchisement, and this in the opinion of the court does not divest the lord of the right which he otherwise would have had, notwithstanding that he is enabled by the Copyhold Act, 1894 (*y*), in a case where the boundaries become confused before the enfranchisement (*z*), to have the boundaries ascertained and neglects so to do.

With reference to the liability of a leaseholder to preserve his boundaries, it has been long settled, that a tenant contracts, amongst other obligations resulting from the relation of landlord and tenant, an obligation to keep distinct from his own property during his tenancy and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own (*a*): there being a common equity, that a tenant, having put his landlord's property and his own together, for his own convenience, and in order to make the most of it during his tenancy, is bound at the end of the term to render up specifically the landlord's land. If he cannot, a commission will issue to inquire what were the lands of the landlord, and if the tenant has so confounded the boundaries, by sub-dividing the land by hedges and stones, and destroying the metes and bounds, that the landlord's land cannot be ascertained, the court will inquire what was the value of the landlord's estate, *valued fairly, but to the utmost as against the tenant*, who has himself destroyed the possibility of the landlord's having his own (*b*).

Moreover, this relief at the suit of the landlord will be granted, not only against the tenant himself, but also against all persons claiming under him, either as volunteers or as purchasers, and whether with or without notice; but it must be shown, that the portion of the land of which the

(*y*) 57 & 58 Vict. c. 46.

(*z*) *Searle* v. *Cooke*, 43 Ch. D. 519.

(*a*) *Att.-Gen.* v. *Fullerton*, 2 V. & B. 263; *Aston* v. *Exeter*, 6 Ves. 292.

(*b*) *Att.-Gen.* v. *Fullerton*, 2 V. & B. 263; *Grierson* v. *Eyre*, 9 Ves. 345. See also *Glynn* v. *Scawen*, Rep. *t.* Finch, 239; *Willis* v. *Parkinson*, 2 Meri. 507; *Godfrey* v. *Littel*, 1 R. & My. 59; 2 R. & My. 630.

tenant is in possession is the specific land originally demised or part thereof (*c*). And the tenant will not be relieved from his liability in respect of a confusion of boundary, by the fact that the boundary was confused by some previous holder of the lands ; for it is the tenant's duty to have the landlord's property *at all times* distinguishable from his own, when the landlord requires it (*d*). Also, each of several co-lessees is under an obligation not only not to intermix the lands, but also not to suffer that intermixture by his co-lessees,—the obligation attaching upon each in respect of all ; for they have one interest as the lessees of their landlord, and that interest is connected with a duty resting upon them all, that each and every of them shall not bring into difficulty the title to the lands (*e*). And in all such cases, the court grants the landlord a commission instead of driving him to an ejectment ; for the tenant's possession gives him an unfair advantage in an ejectment (*f*).

Moreover, the obligation of a tenant to keep distinct, from his own property, his landlord's property rests on him during the subsistence of the term, because the landlord does not lose his interest in the property during the demise, but retains the very important right of having his tenant keep up some clear and sufficient boundary, which will render the two properties clearly distinct: Thus, where the plaintiff and defendant were adjoining owners, and their lands were separated by a ditch and a bank, and on the top of the bank was a post and rail fence ; and the defendant (or his predecessor in title) had obtained from the plaintiff (or his predecessor in title) a lease of portion of the plaintiff's land ; and shortly after the grant of the lease, the defendant (or his predecessor)

(*c*) *Att.-Gen.* v. *Stephens*, 1 Kay & J. 724 ; 6 De G. M. & G. 111 ; 24 L. J. Ch. 694 ; 25 L. J. Ch. 888.

(*d*) *Att.-Gen.* v. *Stephens*, 1 Kay & J. 744.

(*e*) *Willis* v. *Parkinson*, 1 Swans. 9 ; 2 Meri. 507.

(*f*) *Rous* v. *Barker*, 4 Bro. P. C. 660 ; *Att.-Gen.* v. *Fullerton*, 2 V. & B. 263.

had removed the post and rail fence, levelled the bank and filled up the ditch,—the court held the case to be a proper one for the issue of a commission for the purpose of ascertaining the boundaries between the defendant's *own* proper land and the demised lands (*g*).

Where the boundaries have become confused,—or land has been encroached on by the tenant,—the question of boundary should be determined before any renewal of the lease or re-grant of the copyhold (*h*).

A purchaser of lands described as partly freehold and partly leasehold is entitled to have the boundaries between the freehold and the leasehold parts defined, and at the purchaser's expense (*i*), but this is usually guarded against by a special condition of sale providing to the contrary; and the like special condition is usually made in the case of intermixed freehold and copyhold lands,—so that the vendor shall not be required to distinguish the freeholds from the copyholds, or to set out the respective boundaries thereof (*k*); and such conditions are justifiable, where from the change of names, the removal of fences and landmarks, the erection of buildings, and other circumstances, it has become impossible to identify the property intended to be sold with that described in the title-deeds, or to distinguish the parts of it which are freehold from those which are copyhold or leasehold (*l*).

WITH REFERENCE TO THE PARTIES TO AN ACTION TO ASCERTAIN BOUNDARIES, it may be said that the court may require any person or persons to be made parties to the action, that in its opinion are interested in the lands either beneficially or as representatives or trustees, but

(*g*) *Spike* v. *Harding*, 7 Ch. D. 871.

(*h*) *Ireland* v. *Wilson*, 1 Ir. Ch. Rep. 623.

(*i*) *Monro* v. *Taylor*, 8 Ha. 51.

(*k*) *Crosse* v. *Lawrence*, 9 Ha. 462; *Crosse* v. *Keene*, 9 Ha. 469; 1 Dav. Conv. 492.

(*l*) *Flower* v. *Hartopp*, 6 Beav. 476; *Shovel* v. *Bogan*, 2 Eq. Ca. Abr. 688.

the general rule is, that the remaindermen and all persons having any estate or interest in the proceedings are necessary parties to the bill (*m*),—so that a complete decree may be made that will be binding on all of them—a decree for the settlement of boundaries differing in this particular from a decree for partition, which latter decree might be made in favour of tenants for life or years for the period during which their interest continued, without affecting the remaindermen (*n*). And where the suit was for relief in the case of rent, the remedy at law by distress having become difficult by reason of the confusion of boundaries, all the terre-tenants of the lands out of which the rent issued must have been brought before the court, to enable it to make a complete decree (*o*). However, in disputes between the lords of manors and other adjoining independent proprietors, the boundaries might have been settled by agreements between them; and the court would enforce such agreements without making the terre-tenants parties (*p*).

In suits against the Crown, where the rights of the Crown are immediately in question, the person seeking the relief must apply to the Crown itself by petition of right; but where the rights of the Crown are only incidentally involved in the suit, the court simply requires the Attorney-General to be made a defendant,—and does not even require that, if it is quite manifest that the Crown's rights will not be prejudiced: Thus, in a suit to enforce an agreement respecting the boundaries of the two proprietary governments of Pennsylvania and Maryland, the cause was ordered to stand over that the Attorney-General might be made a party in respect of the interest of the Crown, and he eventually left it to the court to

(*m*) *Rayley* v. *Best*, 1 R. & My. 659; *Atkins* v. *Hatton*, 2 Anst. 386.

(*n*) *Baring* v. *Nash*, 1 V. & B. 551.

(*o*) *Benson* v. *Baldwyn*, 1 Atk. 598.

(*p*) *Taylor* v. *Parry*, 1 M. & G. 695; 1 Scott, N. R. 576.

make a decree, *so as not to prejudice the rights of the Crown* (*q*); and in another case the Attorney-General was made a defendant upon a suggestion of some claim on the part of the Crown to the reversion upon a long lease, three hundred years of the term being unexpired (*r*).

WITH REFERENCE TO THE EVIDENCE IN THE ACTION, and specially with reference to discovery and inspection, it was a well-established rule in equity, that the plaintiff was entitled to compel discovery of everything in the possession of the defendant, whether consisting of facts, deeds, papers, or documents, that would help the plaintiff to make out his own case; and the like discovery might also have been compelled by the defendant, without the trouble of filing a cross bill (*s*),—the rule being, that where a man was impeded in the recovery of his property at law, merely by reason of his inability to identify it in consequence of a confusion of boundary, a court of equity would assist him, by compelling a discovery of the parcels, the names of the tenants, and the like (*t*). And where a bill was filed for discovery in aid of an action at law, brought to try whether the plaintiff's house was within the limits of a certain parish, and therefore liable to the parish rates; and the defendant admitted that there were in his possession documents,—such as rate books, account books, minute books, orders, etc.,—which related to the matters in question, and contained evidence both in favour of the plaintiff and of the defendant, the court held that he was bound to produce them for the plaintiff's inspection (*u*). Again, where the plaintiff, in order to find out the parcels and boundaries of the property in litigation, prayed for

(*q*) *Penn* v. *Baltimore*, 1 Ves. sen. 444; *Miller* v. *Warmington*, 1 Jac. & W. 484.

(*r*) *Miller* v. *Warmington*, 1 Jac. & W. 484.

(*s*) *Ingilby* v. *Shafto*, 33 Beav. 31, 42; *Bolton* v. *Corporation of Liverpool*, 3 Sim. 467; 1 M. & K. 88; *Llewellyn* v. *Badeley*, 1 Ha. 525; Wigram on Discovery, 15.

(*t*) *Loker* v. *Rolle*, 3 Ves. 4, 7; *Attorney-General* v. *Emerson*, 10 Q. B. D. 191; *Ponsonby* v. *Hartley*, W. N. (1883), pp. 13, 44.

(*u*) *Burrell* v. *Nicholson*, 1 M. & K. 680.

discovery of old surveys, deeds, etc., which the defendant admitted to have in his possession, he was allowed, as a matter of course, to see such portions of the documents as related to the parcels and boundaries, the inspection of the other portions which did not relate to the subject-matter of the suit being of course withheld (*x*). And wherever the boundaries had been confused by the person whose duty it was to have preserved them, the latter was obliged to produce any evidence he had in his possession, that tended to remove the difficulties which he himself had created (*y*).

The Evidence Act, 1851, and the Common Law Procedure Act, 1854, conferred on the courts of common law a power of compelling discovery of documents similar to that possessed by the courts of equity; but the power of the Court of Chancery to compel discovery in aid of proceedings at law was not thereby taken away, but might still have been exercised, either concurrently with or in aid of the courts of common law (*z*).

Prior to November 2nd, 1875, no order for such discovery or inspection would, as a general rule, have been made, against a defendant who claimed to be a *bonâ fide* purchaser or mortgagee (*a*); but such an order would now be made even as against a *bonâ fide* purchaser or mortgagee (*b*),—and either by a court of law or by a court of equity.

In every action to ascertain the boundaries, the rules of evidence applicable are the rules of the place where the property is situated,—and, therefore, in the case of land

(*x*) *Jenkins* v. *Bushby*, 35 L. J. Eq. 400; *Ponsonby* v. *Hartley*, W. N. (1883), 13.

(*y*) *Southwell* v. *Thompson*, 6 L. J. Ch. (N.S.) 186.

(*z*) 14 & 15 Vict. c. 99; 17 & 18 Vict. c. 125. See also *British Empire Shipping Co.* v. *Somes*, 3 K. & J. 433—436; 26 L. J. Ch. 759.

(*a*) *Wallwyn* v. *Lee*, 9 Ves. 24; *Strode* v. *Blackburne*, 3 Ves. 222, 225; *Jerrard* v. *Saunders*, 2 Ves. jun. 454; *Hunt* v. *Elmes*, 28 L. J. Ch. 680; 2 Powell on Mortgages, 649.

(*b*) *Cooper* v. *Vesey*, 20 Ch. D. 611; *Ind* v. *Emmerson*, 33 Ch. D. 323; 12 App. Cas. 300.

in England, the rules of our own law; but in the case of lands in a British colony (*c*) or in a foreign country (*d*), the rules of such colony or country.

TRIAL, DECREE OR JUDGMENT.—With respect to the mode of trial, the court might either direct a commission to issue for the purpose of ascertaining the boundaries, or it might direct the question or any issue involved therein to be tried in a court of law, and either with or without a jury. When the question was one involving a mere positive affirmation on the one hand, or a negation on the other, an issue was the fitter and more convenient course; but where the object of the inquiry was to ascertain how much of the land had been retained by the defendant, and in what direction,—and, if the part retained could not be exactly ascertained, to determine whether any and what compensation should be made to the plaintiff,—the investigation in such case was much more easily and properly conducted by a commission, composed partly of learned persons and partly of surveyors, perambulating upon the spot (*e*). Occasionally also, a preliminary question of law,—or of mixed law and fact,—may be first ordered to be tried,—as where the Crown seeking to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, and the defendant disputing the Crown's title, the court directed an issue to try the title of the Crown, before inquiring into the question of the boundaries of the foreshore (*f*).

A commission to settle boundaries partakes very much of the nature of a commission of partition, and is approximately in the same form; and it used to issue and be executed and returned in the same manner (*g*). For the decree or judgment directs a commission to issue to

(*c*) *Tulloch* v. *Hartley*, 1 Y. & Coll. C. C. 114; *Kennedy* v. *Trott*, 6 Moo. P. C. 449.

(*d*) *Penn* v. *Baltimore*, 1 Ves. sen. 444.

(*e*) *Godfrey* v. *Littel*, 2 R. & My. 630.

(*f*) *Attorney-General* v. *Chamberlaine*, 4 K. & J. 292.

(*g*) 2 Dan. Ch. Pr., 4th ed., 1056.

certain commissioners therein named, to distinguish the lands of the plaintiff from those of the defendant, and to set out the same by metes and bounds ; and incidentally, it directs all deeds and writings relating to either estate in the custody or power of any of the parties to be produced before the commissioners upon oath, as they shall require ; and declares that the commissioners shall be at liberty to examine witnesses upon oath, to take their depositions in writing, and to return the same with the commission ; and it directs that, after the lands shall be so set out, the defendant shall deliver possession thereof to the plaintiff, and that the plaintiff and his heirs shall hold and enjoy the same against the defendant, or any person or persons claiming under him ; and an account of rents and profits, as well as of all timber cut, is frequently included in the decree or judgment (*h*). Mutual conveyances, however, are not ordered ; because a settlement of boundaries does not amount to an alienation,—the boundaries as settled being presumed to be the true and ancient boundaries (*i*).

At the present day,—and at all events, in ordinary simple cases,—the court will, in lieu of directing a commission to issue, direct an inquiry at chambers to ascertain the boundaries which have been confused (*k*).

COSTS OF ACTION AND OF COMMISSION OR INQUIRY.—No certain rule appears to be laid down with respect to costs in actions relating to boundaries. If the confusion has been occasioned by the fraud or neglect of one of the parties, who had a duty imposed upon him to preserve the boundaries distinct, the whole of the costs of the commission would probably be thrown upon him (*l*) ; but where neither party has been in fault, the costs will be equally apportioned between the plaintiff and the defendant, not-

(*h*) *Willis* v. *Parkinson*, 1 Swanst. 9.

(*i*) *Penn* v. *Baltimore*, 1 Ves. sen. 444, 448. *Vide*, *supra*, p. 253.

(*k*) *Spike* v. *Harding*, 7 Ch. D. 571.

(*l*) *Grierson* v. *Eyre*, 9 Ves. 345.

withstanding the interest of one may be more considerable than the interest of the other (*m*) ; and they have been ordered to be paid rateably to the value of the estates, the boundaries of which were confused (*n*). Again, where a feigned issue had been directed to be tried at law, and the plaintiff was unsuccessful in three trials, he was ordered to pay all the costs, not only at law, but also in equity (*o*). And in a later case the court, in directing a reference to chambers to ascertain boundaries, adjourned the further consideration of the action, and reserved the costs (*p*).

Commissioners under a commission of partition, it has been decided, have no lien on the commission for their charges (*q*) ; and the same rule would probably be held applicable to the case of commissioners to settle boundaries. For, it has been said, it is not competent for an officer of the court to stop and refuse to proceed : but he must go on and complete the duty laid upon him, and he may then come to the court for his remuneration ; and the contrary rule would be highly conducive to injustice, as tending to favour exorbitant demands.

C. Larceny of fences and malicious injuries thereto. —By the Criminal Law Consolidation (Larceny) Act, 1861 (*r*), it is enacted, that whosoever shall steal, or cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire, or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, shall, on conviction before a justice of the peace, forfeit and pay for the first offence, and over and above the value of the article stolen, or the amount of

(*m*) *Norris* v. *Le Neve*, 3 Atk. 82.

(*n*) *Habergham* v. *Stansfield*, 2 Seton on Decrees, 1032, 1034. See also Morgan on Costs, 2nd ed., 244 ; and see *Cannon* v. *Johnson*, L. R. 11 Eq. 90 ; *Ball* v. *Kemp-Welch*, 14 Ch. D. 512.

(*o*) *Metcalfe* v. *Beckwith*, 2 P. Wms. 376.

(*p*) *Spike* v. *Harding*, 7 Ch. D. 571.

(*q*) *Young* v. *Sutton*, 2 V. & B. 365.

(*r*) 24 & 25 Vict. c. 96.

the injury done, such sum not exceeding £5, as to the justice shall seem meet; and the offender may, for a second offence, be sentenced to hard labour for any term not exceeding twelve calendar months (*s*). Also all persons found in possession of any part of a tree, fence, gate, etc., and not satisfactorily accounting for the same, may be sentenced to pay, over and above the value of the article, a fine not exceeding £2 (*t*).

By the Criminal Law Consolidation (Malicious Injuries to Property) Act, 1861 (*u*), persons unlawfully and maliciously cutting, breaking, throwing down, or in anywise destroying any fence of any description, or any wall, stile or gate, or any part thereof respectively are subject to the like penalties as are contained in s. 34 of the Larceny Act, 1861, above mentioned (*x*), and the like penalties may be inflicted on persons doing any malicious injury to sea and river banks, and to works on rivers, canals, etc. (*y*).

Persons wilfully displacing or injuring the fences or posts of any street may, under the Public Health Act, 1875, be subjected to a penalty not exceeding £5 (*z*).

(*s*) 24 & 25 Vict. c. 96, s. 34.

(*t*) 24 & 25 Vict. c. 96, s. 35. See also *R.* v. *Shepherd*, L. R. 1 C. C. R. 118.

(*u*) 24 & 25 Vict. c. 97.

(*x*) 24 & 25 Vict. c. 97, s. 25.

(*y*) 24 & 25 Vict. c. 97, ss. 30, 31.

(*z*) 38 & 39 Vict. c. 55, s. 307.

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